Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

MAHER TERMINALS, INC.,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR and VINCENT RIGGIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should employment "status" for Mr. Riggio under the Longshore and Harbor Workers' Compensation Act be determined based on: (1) "the job he was hired for", as held by the Ninth Circuit, or (2) an examination of an undefined period of his past work history, unrelated to "the job he was hired for", as held by the Third Circuit?

CORPORATE DISCLOSURE STATEMENT

Maher Terminals, Inc. is a privately held corporation. There is no parent or publicly held company owning any of its stock.

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CITATIONS TO OPINIONS AND ORDER BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Appendix page 1a "App. 1a") is cited at *Maher Terminals, Inc. v. Director, OWCP and Vincent Riggio*, 330 F.3d 162 (3rd Cir. 2003).

The Decision and Order of Administrative Law Judge Ainsworth Brown (App.45a) denying Mr. Riggio's claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (hereinafter "LHWCA") is

unreported. The Decision and Order of the Benefits Review Board (App.37a) vacating the denial of benefits and remanding is cited at *Riggio v. Maher Terminals, Inc.*, 31 BRBS 58 (1997). The Decision and Order on Remand of Administrative Law Judge Ralph A. Romano (App.33a) denying Mr. Riggio's claim for benefits under the LHWCA is unreported. The Decision and Order of the Benefits Review Board (App.14a) reversing the denial of benefits is reported at *Riggio v. Maher Terminals, Inc.*, 35 BRBS 104 (2001).

STATEMENT OF THIS COURT'S JURISDICTION

Petitioner seeks review of a judgment of the United States Court of Appeals for the Third Circuit entered on May 29, 2003. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 903(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.* provides:

> (a) Disability or death; injuries occurring upon navigable waters of United States
>
> Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a).

Section 902(3) provides:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include—
>
> (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
>
> (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
>
> (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
>
> (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;
>
> (E) aquaculture workers;
>
> (F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;
>
> (G) a master or member of a crew of any vessel, or
>
> (H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;
>
> if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. § 902(3).

STATEMENT OF THE CASE

Legal Issue:

Mr. Riggio sustained an injury while at work for Maher Terminals, Inc. ("Maher") a marine terminal operator in Port Elizabeth, New Jersey, on property leased from the Port Authority of New York and New Jersey adjoining Newark Bay. Mr. Riggio has been compensated for his injury through state workers compensation. The federal question being submitted to this Court is whether Mr. Riggio should have received compensation under the applicable state workers compensation program or under the federal workers compensation program established under the Longshore and Harbor Workers' Compensation Act (LHWCA). The LHWCA was enacted by Congress pursuant to the admiralty and maritime jurisdiction of the federal government (U.S. Constitution Article 3, section 2) and the necessary and proper clause (Article 1, section 7).

The answer to this question turns on whether Mr. Riggio at the time of his injury met the employment "status" test set out in the LHWCA. There is now a split in the Circuits on how to resolve this question.[1]

General Background:

Mr. Riggio was a "casual" day laborer provided to Maher through the union hiring hall. Each day, Maher orders labor from a local union hiring hall. This day labor includes, among others: (1) delivery clerks and receiving clerks

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[1] This question is more than an abstract legal question because the Federal LHWCA is significantly more expensive than most state workers compensation programs. The statutory provisions at issue in this case were adopted by Congress as part of an effort to control the cost of the Federal LHWCA program by excluding some workers from coverage. *See infra* at Point IV.

("clerks [2] ") and (2) checkers [3]. Which employees work as clerks or checkers and the number of employees who work as clerks or checkers changes almost daily based on factors such as the needs of the employer, employee schedules, and seniority rules. The employment of these clerks and checkers is governed by the Waterfront Commission of New York Harbor Rules and Regulations [4] and the Collective Bargaining Agreement between the New York Shipping Association, Inc. (NYSA) [5] and the International Longshoremen's Association ("ILA").

Facts of the Case:

Mr. Riggio was a member of Local 1 of the ILA (the clerks and checkers local) and was on Maher's permanent hire list, but was not on a specific job list (App.3a). The significance of these facts is that if Mr. Riggio was hired by Maher on a given day, he could be hired as a clerk or he could be hired as a checker (App.3a). Mr. Riggio also could be hired by other employers covered by the collective bargaining agreement and, in fact, had worked for other employers on the waterfront when there was no work at Maher (App.17a).

When hired as a *clerk*, Riggio worked exclusively in an office doing clerical work (App.3a), a job clearly excluded from coverage under the LHWCA since the definition of

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[2] Delivery and receiving clerks work in an office on the terminal entering data into a computer.

[3] Checkers oversee the movement of cargo on and off vessels and within the terminal. Their duties require them to be in the areas where cargo is handled and consequently to be exposed to maritime hazards. 1984 U.S. Code Congressional and Administrative News, 98th Congress, Legislative History, p.2736-2737.

[4] 21 NYCRR 1.1 *et. seq.*

[5] NYSA is a multi-employer bargaining unit that represents Maher and other employers in collective bargaining.

"employee" under the Act specifically excludes "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work." 33 U.S.C. § 902(3)(A). When hired as a *checker*, Mr. Riggio's work on the waterfront included checking cargo entering and leaving the terminal either by truck or ship (App.3a). It is equally clear that the responsibilities of a checker fall within the status test outlined in the LHWCA since Congress intended to include workers in areas where cargo is handled. *Infra* at Point IV. When hired in either position, Mr. Riggio was not subject to reassignment to the other position for the day of his hire (App.2a).

On February 3, 1994, Mr. Riggio, was hired by Maher as a clerk to enter data into a computer in a Maher office. While working that day as a clerk, Mr. Riggio sustained an injury when he fell off a chair in the delivery office at the terminal (App.2a). Maher voluntarily paid claimant compensation under the State of New Jersey workers compensation statute. Subsequently claimant filed this claim for benefits under the LHWCA (App.46a).

Procedural History:

The matter was tried before Administrative Law Judge Ainsworth Brown who found that claimant's job fell within the office clerical exclusion to coverage under Section 902(3)(A) and denied the claim (App.47a).

Claimant appealed to the Benefits Review Board. The Board vacated Judge Brown's decision and remanded the case holding that Judge Brown should have applied the standard set forth in the Board's decision in *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989) since claimant occasionally worked as a checker prior to his employment as a delivery clerk (App.42a).

On remand, the matter was reassigned to Administrative Law Judge Ralph A. Romano. In denying the claim, Judge

Romano found that *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977) does not confer "status" on an office worker who occasionally worked as a checker in the past since he was not subject to reassignment during the same day that he worked as an office clerk (App.35a-36a).

Claimant again appealed to the Benefits Review Board. The Board reversed the decision of Judge Romano and found the claimant satisfied the "status" requirement for coverage under the LHWCA by working in the past as a checker, while ignoring the fact that the job for which claimant was hired on the day of his injury was exclusively clerical, *i.e.*, a clerk, and that he was not subject to reassignment for the term of his hire and had no job duties which would have required him to be exposed to maritime hazards (App.31a).

The Employer petitioned the United States Court of Appeals for the Third Circuit pursuant to 33 U.S.C. § 921(c). The Third Circuit, applying an employment history test, found that since claimant had been hired by Maher in the past as a checker and had worked fifty (50) percent of the year for Maher as a checker (an indisputably covered job), he satisfied the "status" test for coverage even when he was hired exclusively as a clerk (an indisputably excluded job) (App.13a).

Maher has filed this Petition for a Writ of Certiorari within 90 days of the entry of the judgment by the United States Court of Appeals for the Third Circuit on May 29, 2003.

ARGUMENT

POINT I

Intervention is necessary to resolve a conflict in the Circuits over the LHWCA test for "status", in particular whether the test should include a review of an undefined period of work history, or a review of the job duties for the current employment.

To be eligible for compensation under the LHWCA, an employee must independently satisfy both an employment "situs" and employment "status" test. "Situs" is not in dispute. "Status" is met when the worker is engaged in maritime employment. 33 U.S.C. § 902(3).

It is beyond dispute that the job for which Mr. Riggio was hired on the day of his injury does not meet the status test set forth within the LHWCA since it was exclusively office clerical. 33 U.S.C. § 902(3)(A). The definition of "employee" under the LHWCA specifically excludes "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work." 33 U.S.C. § 902(3)(A). Stated another way, if Mr. Riggio had spent his entire career working as a clerk, there would be no question in any Circuit that he did not satisfy the status requirement of the LHWCA.

In the Ninth Circuit, the fact that the job for which Mr. Riggio was hired did not meet the status requirement of the LHWCA would be the end of the inquiry. The basis of the Ninth Circuit's holding was this Court's decision in *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997). In fact, the Ninth Circuit had reached a similar conclusion to that now taken by the Third Circuit. Relying on its decision in *Papai v. Harbor Tug and Barge Co.*, 67 F.3d 203 (9th Cir. 1995), *rev'd* 520 U.S. 548 (1997), the Ninth Circuit ruled that an individual could establish "maritime employment" by overall employment history and being hired out of a union hiring hall even if the job for which he was hired was clearly non-

maritime. *McGray Construction Co. v. Director*, 112 F.3d 1025 (9th Cir. 1997), *withdrawn*, 124 F.3d 1310 (9th Cir. 1997). After this Court reversed the case upon which it had relied, the Ninth Circuit granted rehearing and withdrew its prior opinion. *McGray Construction Co. v. Director*, 124 F.3d 1310 (9th Cir. 1997).

The Ninth Circuit recognized that applying an employment history test to the "status" inquiry was "untenable" in light of *Harbor Tug*. Rather, the Court looked at the essential duties of the job for which the employee was hired when he was injured. The Court held:

> [W]orking out of a union hall from which employers regularly hire maritime workers, and a history of maritime employment, do not make one a maritime employee when an employer hires the individual for a non-maritime job. The statutory term 'person engaged in maritime employment' means 'engaged' on this job.

McGray Construction Company v. Director, OWCP, 181 F.3d 1008, 1014 (9th Cir. 1999).

The Ninth Circuit further noted:

> The concern with "walking in and out of coverage" is not a metaphor suggesting that once a person is a maritime worker for long enough, he remains one, even on a non-maritime job for a non-maritime employer.

181 F. 3d at 1015.

The Ninth Circuit, in rejecting an overall employment history test for coverage, expressed concern for uniformity of coverage. The Court noted:

> Suppose a load falls on two construction workers hired to do exactly the same non-maritime job together, and one of them has in other employments done maritime work. Were we to accept the Director's argument, the worker with the maritime history would get benefits under the federal Longshore and Harbor Workers' Com-

> pensation Act, and his coworker under the state Workers' Compensation act. It is a plain injustice for two men to be treated differently when exactly the same mishap injures both of them simultaneously in the same job, because one of them has a history of a different kind of employment.

181 F. 3d at 1016.

In this case, Mr. Riggio was hired for a non-maritime job (a clerk) when he was injured. It is quite clear that had the injury occurred within the Ninth Circuit, claimant would have been excluded from coverage based upon an analysis of the duties of the job for which he was hired at the time of injury. In contrast, the Third Circuit has found claimant covered under the LHWCA based upon an examination of an undefined period of prior work history irrespective of the duties of the job for which he was hired on the day of his injury.

The application of the Ninth Circuit's approach to this case is straightforward. The job for which Mr. Riggio was hired does not meet the status requirement of the LHWCA, therefore, Mr. Riggio is not eligible for benefits under the LHWCA.

The Third Circuit decided to take an alternative approach and reject the approach taken by the Ninth Circuit in *McGray Construction* and this Court in *Harbor Tug*. The Third Circuit recognized that the job Mr. Riggio was hired for did not meet the status test of the LHWCA[6], but then conducted

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[6] The Court stated:

> The law is clear that delivery clerks, performing the function that Riggio was on the day of his injury, are not covered under the Act. *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 (3rd Cir. 1977); *see also Sette v. Maher Terminals, Inc.*, 27 BRBS 223 (1993) (denying coverage for a delivery clerk).

(App.9a)

an inquiry into whether other jobs for which Mr. Riggio had been hired in the past met the status test of the LWHCA.

As noted above, Mr. Riggio had been hired in the past for other jobs that met the status requirement of the LHWCA. Therefore, the Third Circuit concluded that Mr. Riggio could use past employment, unrelated to the job for which he was hired, to meet the status test of the LHWCA (App.13a).

The approaches taken by the Third and Ninth Circuits are in direct conflict. This Court should resolve this conflict.

POINT II

The Third Circuit Decision based upon an examination of prior work history is inconsistent with and ignores this Court's holding in *Harbor Tug*.

This Court should grant certiorari in this case because the Third Circuit's decision is inconsistent with *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 558 (1997). In *Harbor Tug*, this Court was called on to address the question of whether employment history with a particular employer is relevant to the seaman status inquiry under the Jones Act, 46 U.S.C. § 688. The Court granted certiorari in order to clarify its decision in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) which had been subject to differing interpretations by the Circuits. *Harbor Tug*, 520 U.S. at 550-51.

In *Harbor Tug*, this Court rejected the overall employment history in connection with the determination of Jones Act seaman's status. The Court stated ". . . the employee's prior work history with a particular employer may not affect the seaman inquiry if the employee was injured on a new assignment with the same employer, an assignment with different 'essential duties' from his previous ones". *Harbor Tug*, 520 U.S. at 556. The Court was concerned with predictability of coverage "before a particular work day begins". *Id* at 558.

The Court stated:

> Considering prior employments with independent employers in making the seaman-status inquiry would undermine "the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act (*and perhaps more importantly for purposes of the employers' workers' compensation obligations, who will be covered by the LHWCA*) before a particular work day begins." (Emphasis added. Citations omitted.)

While we recognize that *Harbor Tug* is a Jones Act case, it is clear that the Supreme Court considered the text and purpose of the LHWCA in determining seaman status under the Jones Act. Since the two statutes are mutually exclusive, it would create confusion with regard to coverage were two different tests to apply[7]. For example, under an overall employment history test, a long-time longshoreman injured while temporarily serving as a seaman would be covered under the LHWCA even though masters and members of the crew (seamen) are specifically excluded from coverage. 33 U.S.C. § 902(3)(G). The Ninth Circuit understood *Harbor Tug* to apply equally to the determination of employment status under the LHWCA. *McGray Construction Company v. Director, OWCP*, 181 F.3d 1008 (9th Cir. 1999). In our brief and at the oral argument, we urged the Third Circuit to do likewise. However, the Third Circuit held that claimant's overall employment history should be considered in determining coverage. The Court requested that the employer stipulate that for some unspecified period prior to his accident, claimant worked 50% of the year as a checker and 50% of the year as a clerk (App.3a). Based upon this Court's

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[7] Both statutes derive from the admiralty and maritime jurisdiction of the U.S. government and have their origins in the ancient principles of maintenance and cure.

holding in *Harbor Tug* and the Ninth Circuit's holding in *McGray Construction*, the employer agreed. The Third Circuit completely ignored the *Harbor Tug* case and attempted, albeit weakly, to distinguish *McGray Construction* on the basis that the claimant in that case was working for a different employer who would not have known his work history (App.13a). This was a misrepresentation of the holding in *McGray Construction*. The Ninth Circuit was concerned with uniformity of coverage. The fact that the claimant in that case was hired by a different employer was incidental to the holding. Under the Third Circuit's reasoning, if Mr. Riggio had worked in the past for another stevedore as a checker and then was hired by Maher as a clerk, he would not be covered. However, since he worked for Maher in the past as a checker, he is covered when he works as a clerk. This is the very "injustice" that the Ninth Circuit sought to avoid. *McGray Construction*, 181 F.3d at 1016.

Since the Third Circuit's decision conflicts with this Court's holding in *Harbor Tug*, this Court should intervene to resolve the issue of whether employment history is a relevant factor in the employment status inquiry under the LHWCA.

POINT III

The approach taken by the Third Circuit is not consistent with the prior holdings of this Court.

In holding that Mr. Riggio satisfied the "status" requirement for coverage under the LHWCA, the Third Circuit stated that since he "spent half of his time as a checker, an indisputably longshoring job, he is covered under the LHWCA even though he worked as a clerk on the day of his injury" (App.13a). In reaching this conclusion, the Third Circuit looked at an unspecified period of overall employment history with this employer without regard to the regular duties of the job for which claimant was hired on the day of his accident. The Third Circuit relied on this Court's opinion

in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), a decision rendered before the 1984 amendments that added the "employed exclusively to perform office clerical" language in dispute in this case. *Pub. L.* 98-426 § 2(a). Specifically, the Third Circuit seized on this Court's statement that in order to satisfy the "status" requirement, workers must spend "at least some of their time in indisputably longshoring operations". *Caputo*, 432 U.S. at 273 (App.8a).

Unlike Mr. Riggio for the term of his employment as a clerk, both claimants in the *Caputo* case, as part of their regularly assigned duties, could have been, and had been assigned work that was indisputably covered. Claimant Blundo in the *Caputo* case, was a checker when he was injured. As the Court noted:

> Blundo was assigned his tasks at the beginning of each day and until he arrived at the terminal he did not know whether he would be working on a ship or on shore. He was reassigned during the day if he completed the task to which he was assigned initially.

Caputo, 432 U.S. at 253. Given these facts, Blundo clearly walked in and out of coverage during the term of his employment as a checker. He, therefore, was covered even though he arguably was not involved in the loading or unloading of a vessel at the moment of injury.

With respect to claimant Caputo, the Court noted:

> On the day of his injury [Caputo] was hired by petitioner [N]ortheast as a terminal laborer. In that capacity, he could have been assigned to any one of a number of tasks necessary to the transfer of cargo between land and maritime transportation, including stuffing and stripping containers, loading and discharging lighters and barges, and loading and unloading trucks. Not only did he have no idea when he set out in the morning which of these tasks he might be assigned, but in fact his assignment

> could have changed during the day. Thus, had Caputo avoided injury and completed loading the consignee's truck on the day of the accident, he then could have been assigned to unload a lighter. [Footnote and citations to the record omitted.]

Caputo at 273-74. Thus, during the term of his employment, Caputo could have been, and had been, assigned to both covered and non-covered duties. The Court concluded that he was covered for the entire term.

On the other hand, Mr. Riggio, when he was hired for the job of clerk, worked exclusively in an office doing clerical work. At no time was he ordered to work in dual job assignments during the same employment. If he was hired as a clerk, he worked exclusively as a clerk. If he was hired as a checker, he worked exclusively as a checker for the term of that employment. He never walked in and out of coverage during each employment.

The approach taken by the Third Circuit—examining an undefined period of prior work history to determine coverage rather than limiting the inquiry to the job for which he was hired—leads to total uncertainty as to who is and who is not covered under the LWHCA. The Third Circuit approach would require unending litigation to determine what prior history is included and excluded, for how long a time period, and under what circumstances. Without a clarifying amendment from Congress, the Courts can anticipate a decade of litigation over this issue.

Because the holding of the Third Circuit is inconsistent with a prior holding of this Court, this Court should grant certiorari to enforce its prior holding.

POINT IV

The Third Circuit Decision is inconsistent with the legislative intent of the 1984 amendments to limit coverage under the LHWCA.

In 1984, Congress amended the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. § 901 *et seq*. Particularly, Congress amended the definition of employee in Section 902(3) by adding subparagraphs (A) through (F). *Pub. L.* 98-426 § 2(a). Clearly, the 1984 amendments were intended to restrict coverage. The Legislative History accompanying the amendments so states as follows:

> S.38 . . . is intended to reduce the cost of Longshore coverage for employers in the covered industries in a manner which will disturb, to the most limited extent possible, the rights and benefits which the Longshore Act provides.

1984 U.S. Code Congressional and Administrative News, 98th Congress, Legislative History, p.2736.

Further, Hon. Austin J. Murphy in a statement accompanying the amendments stated:

> I wish to commend Congressman Miller, . . ., for the job which he has done in both this Congress and in the 97th Congress in attempting to revise the provisions of the Longshoremen's and Harbor Workers' Compensation Act. *Such revision is necessary because of the hardship it has placed upon many of this nation's basic industries, and because of the inclusion in the 1972 amendments of many workers who did not truly meet the intent of the original Act.* (emphasis added)

Id. p.2764

The following excerpt is also relevant to a clear understanding of the legislative intent:

> The definition of the term "employee" is modified to exclude from the term "employee", and thus from the coverage of the Longshore Act, certain categories of workers who are not engaged in maritime occupations or *who are not exposed to maritime hazards even though they may be employed by maritime employers* . . . (emphasis added)

Id. at p.2736. It is submitted that falling off a chair in the delivery office is not a "maritime hazard".

> Not all clerical work is intended to be excluded - merely that which is performed exclusively in a business office of the employing enterprise. Workers who may be classified as clerks or cargo checkers for example may be deemed to be engaged, at times, in "clerical" type work, *but that work is done in the areas in which cargo is handled*, not exclusively in a business office of the stevedore. In such circumstances, the checker or clerk would remain within Longshore Act jurisdiction. (emphasis added)

Id. at p.2737.

The job held by Mr. Riggio as a clerk was exclusively clerical. He spent all of his time during the workday in an office. None of his work was performed in the areas where cargo was handled. It is crystal clear that Congress did not intend to extend coverage to employees like Mr. Riggio who fell off his chair while pushing away from his desk in the delivery office. The Third Circuit's holding that Mr. Riggio is covered for this "hazard" is contrary to Congress's intent to limit coverage to those workers who are exposed to maritime hazards. In this seniority-based industry, the higher paying clerk jobs go to the most senior employees. It follows that all clerks would have worked as checkers in the past. Therefore, the Third Circuit's past employment test for evaluating mari-

time status has the practical effect of writing "status" out of the statute. The Third Circuit's decision so far departs from Congress's intent to restrict coverage under the LHWCA that this Court should exercise its supervisory power to remedy this error.

CONCLUSION

It is respectfully submitted that this petition should be granted to resolve a conflict among the Circuits over the appropriate test for employment status under the Longshore & Harbor Workers' Compensation Act and to remedy an erroneous Third Circuit decision that conflicts with prior decisions of this Court and legislative intent.

Respectfully submitted,

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August 26, 2003

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed May 29, 2003]

No. 01-3343

MAHER TERMINALS, INC.,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; VINCENT RIGGIO,
Respondents.

On Petition for Review Pursuant to 33 U.S.C. § 921(c) of the Decision and Order of the United States Department of Labor, Benefits Review Board, Entered June 28, 2001(BRB Nos. 96-1136 and 00-960)

Argued February 24, 2003

Before: BECKER, *Chief Judge*,* SCIRICA, *Circuit Judge*** and SHADUR,*** *District Judge*.

OPINION OF THE COURT

BECKER, *Circuit Judge*.

The sole question in this petition for review of the order of the United States Department of Labor, Benefits Review

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* Judge Becker completed his term as Chief Judge on May 4, 2003.

** Judge Scirica succeeded to the position of Chief Judge on May 4,2003.

*** Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

Board (the "Board") to whether the claimant, Vincent Riggio, is a covered maritime employee under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq.*(the "Act"). Riggio was employed by petitioner Maher Terminals, Inc. ("Maher") as both checker, a covered position, and delivery clerk, a job that is not covered by the Act.[1] Although Maher stipulated at oral argument that Riggio split his time evenly between these jobs, the company argues that Riggio is not covered by the Act because on the day of his injury he was working as a delivery clerk and was not subject to reassignment. In response, Riggio asks us to follow the reasoning of the Board and find him covered because although he was not working in a covered position on the day of his injury, he regularly engaged in covered maritime employment. Thus, Riggio submits, his job at Maher required him to spend "at least some of [his] time in indisputably longshoring operations," the test for coverage articulated by the Supreme Court in *Northeast Marine Terminal Co. v. Caputo*,432 U.S. 249, 273 (1977).

We agree with Riggio's interpretation of the Act and will not adopt Maher's narrow interpretation of the Act's coverage analysis that would include only the day on which the claimant was injured. Instead, we believe that we must look at the claimant's regular duties to determine whether he is engaged on a regular basis in maritime employment. We will therefore deny Maher's petition for review.

I.

The facts are not disputed. On February 3, 1994, Riggio injured his left arm when he fell off a chair while working in the office of Berth 62 of Maher's port facilities in Elizabeth,

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[1] Delivery clerks are not covered by the Act because they perform clerical work in an office; in contrast, checkers are covered because they are involved in the loading and unloading process, traditional longshoring work that generally involves activities on the docks.

New Jersey. Although he was employed as a delivery clerk on the day of his injury, Riggio split his time evenly between work as a checker and as a delivery clerk for Maher.[2] He was a member of the local checker's union and remained on Maher's permanent hire list, but not on a specified job list, so that the dock boss could assign him to a different job each day. When Riggio worked as a checker, he was required to be in the shipping lanes, but when employed as a delivery clerk, Riggio worked exclusively in the office entering data into a computer. In both jobs, his function was to handle paperwork for the in-coming and out-going cargo.

This case has a lengthy administrative history. Because the facts are not in dispute the sole issue in the administrative proceedings was the legal question whether Riggio's claim is covered under the Longshore & Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq.* The first administrative law judge ("ALJ") to hear the case, Judge Ainsworth Brown, denied coverage because he found that Riggio's job as a delivery clerk was excluded from coverage because it was a clerical position under 33 U.S.C.§ 902(3)(A) (stating that "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work" shall not be considered maritime employees covered by the Act). Judge Brown determined that even though Riggio also worked as a checker, this was insufficient to satisfy his burden of proving coverage under this court's decision in *Maher Terminals, Inc.*

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[2] The parties originally disagreed as to what percentage of his time Riggio worked as a checker or a delivery clerk. In the first hearing before the administrative law judge, Riggio testified that he split his time evenly between these positions. Maher disputed this assertion by presenting evidence that Riggio had worked solely as a delivery clerk in the two weeks before the injury. Maher conceded on remand before the administrative law judge that Riggio worked occasionally as a checker and was subject to assignment to this position. However, at oral argument before this court, Maher stipulated to the fact that Riggio worked 50% of his time as a checker and the other 50% as a delivery clerk.

v. Farrell, 548F.2d 476 (3d Cir. 1977) (holding that a delivery clerk is not covered under the Act).

On appeal, the Benefits Review Board vacated Judge Brown's denial of benefits. It noted that because Riggio also worked as a checker, he could not have been "exclusively" employed as a delivery clerk within the meaning of 33U.S.C. § 902(3)(A). The Board remanded the case to the Office of Administrative Law Judges for further proceedings. Before the case was heard again, Maher petitioned this court for review of the Board's order, but we dismissed the petition for lack of jurisdiction. The parties also agreed on a stipulation resolving the medical and compensation issues subject to the final resolution of the coverage issue.

On remand, the case was assigned to a different ALJ, Judge Ralph A. Romano, whom the parties informed about their stipulation, although they did not ask him to enter the stipulation into the record at that time. Judge Romano held4that a delivery clerk could be covered by the Act only if he were subject to reassignment as a checker during the course of a single workday. Since Riggio worked only as a delivery clerk on the day of his injury and did not demonstrate that he was subject to reassignment during that day, Judge Romano denied him coverage. Riggio appealed again to the Board, which rejected Judge Romano's "same day of injury" status test. Instead, the Board found Riggio to be covered because "he was assigned to work as a checker by [Maher] as a part of his regular duties," even though he did not work as a checker on the day of his injury or even in the two weeks previous. Accordingly, the Board reversed Judge Romano's order and remanded the case "for consideration of any remaining issues."

Within the mandated 60 day period to appeal, *see* 33U.S.C. § 921(c), Maher filed a petition in this court for review of the Board's decision. Riggio subsequently filed a motion to hold briefing in abeyance pending the finalization of the stipu-

lation referred to above regarding the amount recoverable upon resolution of the coverage issue. The final version of the stipulation read in relevant part:

> There is dispute [*sic*] between claimant and employer as to the existence of jurisdiction under the Longshore and Harbor Workers' Compensation Act. The employer does not concede the existence of such jurisdiction by reason of the execution of this stipulation. The parties agree, in the event of a finding of jurisdiction under the Act, that the injury has caused a permanent loss of use to the left upper extremity and that the claimant is entitle [*sic*] to an award of 4% of the left arm, equaling12.48 weeks, at a weekly rate of $738.30 pursuant to33 U.S.C. 908(c)(1).
>
> . . .
>
> Additionally, in the event that the third Circuit [*sic*]finds jurisdiction under the [Act], and an award of 4% of the left arm is awarded, a fee of $7,500.00 should be paid to the firm of Israel, Adler, Ronca & Gucciardo up and above compensation paid to the claimant.

Judge Romano issued an order approving the stipulation, but he characterized the stipulation as a settlement. Recognizing that Judge Romano's order of settlement was not what the parties wanted, Maher petitioned Judge Romano to amend the order to reflect that the agreement is a stipulation and not a settlement. In a subsequent order, Judge Romano complied with this request.

We have appellate jurisdiction to review the Board's order under 33 U.S.C. § 921(c).[3] Our examination is "limited to a

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[3] The Director, Office of Workers' Compensation Programs, a respondent in this case, filed a motion to dismiss Maher's petition for review, claiming that this court lacks jurisdiction to hear this appeal because the Board's decision was not a "final order" within the meaning of 33U.S.C. § 921(c). We will deny this motion because although the Board remanded the case to the ALJ for further consideration, there was nothing more for

determination of whether the Board acted in conformance with applicable law and within its proper scope of review." *Curtis v. Schlumberger Offshore Services., Inc.*, 849 F.2d805, 807 (3d Cir. 1988). Because the Board does not administer the Act, our review of its interpretation of the Act is "essentially plenary" but we "will 'respect' [the Board's] interpretation if it is 'reasonable.' " *Sea-Land Serv., Inc. v. Rock*, 953 F.2d 56, 59 (3d Cir. 1992) (quoting *Curtis*,849 F.2d at 808).

II. Coverage

A. Description of the Coverage Test

The 1972 amendments to the Longshore and Harbor Workers Compensation Act created a "two-part test 'looking both to the "sit us" of the injury and the "status" of the injured,' to determine eligibility for compensation." *Rock,* 953 F.2d at 60 (quoting *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 265 (1977)). Because Congress included a broad geographical area in the "situs" component of the test, including both injuries on water and areas on land that are connected to maritime activity, it limited the persons who fulfill the "status" test to those who "engaged in maritime employment." 33 U.S.C. § 902(3). The Act defines such persons as:

> any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include—

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the ALJ to decide in light of the parties' stipulation resolving all issues except for the legal question of coverage. Because the Board's order was "for all purposes final by the time this court was called upon to consider the petition," we have jurisdiction under the Act. *Sea-Land Serv., Inc. v. Director, OWCP*, 540 F.2d 629, 631 n.1 (3d Cir.1976).

> (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

Id. We noted in *Rock* that this definition of "maritime employment" is rather imprecise, but that Congress "came closest to defining this key term in the 'typical example' of the expanded coverage set forth in the legislative history."953 F.2d at 60. The legislative history explains:

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. . . . [E]mployees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment.

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4708.

In its decision in *Caputo, supra*, the Supreme Court read the "typical example" in the legislative history quoted above as indicating Congress's intent "to cover those workers involved in the essential elements of unloading a vessel—taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area." 432 U.S. at 267. In contrast, "the example also makes it clear that persons who are on the situs but are not engaged in

the overall process of loading and unloading vessels are not covered." *Caputo*, 432 U.S. at 267; *see also Chesapeake and O.R. Co. v. Schwalb*, 493 U.S. 40, 46 (1989) (stating that the coverage test for "land-based work other than longshoring and the other occupations named in § 902(3) is an occupational test focusing on loading and unloading").

Importantly, the *Caputo* Court specifically rejected the "moment of injury" principle, in which the coverage analysis depended on the task that the employee was engaged in at the time of the injury. Rather, the Court held that "when Congress said it wanted to cover 'longshoremen,' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 amendments, would be covered for only part of their activity." 432 U.S. at 273.The Court emphasized this point again in *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 81 (1979), when it stated that "[a]worker responsible for some portion of that (longshoring) activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." In *Rock, supra*, we explained the Court's interpretation of the Act as seeking "to avoid 'shifting coverage' . . . by extending coverage to an employee who throughout the day might have been assigned to unload a vessel but at the hour of the accident had been temporarily assigned a task that might not have been covered under the Act." 953 F.2d at 63.

Although the Supreme Court's decisions indicate a rather liberal analysis of the extent of coverage, we held in *Rock* that there is a limit to those covered by the Act. In that case, the claimant had been employed for several years as a longshoreman, but eventually decided to work solely as a courtesy van driver, a choice he was entitled to by virtue of his seniority. The claimant worked solely in this function for two years before the date of his injury, which occurred during the course of his job as a driver. We determined that this type of employment was not covered under the Supreme Court's

interpretation of the Act because a courtesy van driver is not "an essential element or ingredient of the loading or unloading process." 953 F.2d at 67. Although we noted that the claimant was officially subject to reassignment as a longshoreman, we declined to grant him coverage for that reason alone because we did not think that the "shifting coverage" aspect of *Caputo* applied. We explained:

> The [*Caputo*] holding cannot be stretched to cover Rock, who voluntarily chose a position that would no longer involve him in the dangers of loading and unloading, and whose only occupation in the two years in which he held his new job was to drive the courtesy van. [*Caputo*] protects those employees who walk in and out of coverage on a frequent basis, not those who are nominally subject to reassignment.

Id. at 67 n.17.

B. Application of the Coverage Test

The parties agree that the only dispute over Riggio's coverage regards his status as a maritime worker—not the situs of the injury. Riggio makes two arguments in favor of coverage. First, he asserts that his job as a delivery clerk, which he was performing on the day of the injury, was a covered form of employment. Second, he contends that because he worked on occasion for Maher as a checker, and was subject by Maher to assignment on any day as a checker, this too confers coverage. We do not find Riggio's first argument persuasive. Riggio admits in his brief that he "does not contend that his office activities, considered in isolation, confer [statutory coverage]." The law is clear that delivery clerks, performing the function that Riggio was on the day of his injury, are not covered under the Act. *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 (3d Cir. 1977); *see also Sette v. Maher Terminals, Inc.*, 27 BRBS 223 (1993) (denying coverage for a delivery clerk).

In his second argument, Riggio urges us to look beyond the day of the injury in order to determine whether he was "engaged in maritime employment." In other words, Riggio submits that because he worked half of his time as a checker, a job that is covered under the Act, *see Rock*, 953F.2d at 64, and was subject to assignment as a checker, it would be improper to look merely at the moment of his injury to characterize whether he was engaged in maritime employment. Maher disagrees with this analysis and argues that our decision in *Farrell, supra,* is "on all fours" with the case at bar. The employee in *Farrell*, like Riggio on the day of his injury:

> worked in an office. He did not work on the pier, in the yard, or on the dock as a checker . . . . That on occasion he left the office to examine markings on cargo, and that in the past he had worked as a checker is not controlling. What is controlling is the nature of his primary duties. As we perceive the congressional intent, that is the sole test. Farrell's primary duties being that of a clerk and not a checker, he is excluded from coverage.

548 F.2d at 478. Despite these similarities, Riggio contends, and the Board agreed, that the analysis in *Farrell* is no longer valid in light of *Caputo* and other subsequently decided Supreme Court cases. Riggio argues persuasively that *Caputo*'s holding that covered employees must "spend at least some of their time in indisputably longshoring operations," 432 U.S. at 273, creates a broader scope of coverage than *Farrell*'s "primary duties" test.

For further support, Riggio notes that in our decision in *Rock*, we cited with approval the Court of Appeals for the First Circuit's opinion in *Levins v. Benefits Review Board*,724 F.2d 4 (1st Cir. 1984). *Levins* concerned whether an employee who was called a "book clerk" was covered under the Act. Rather than look only at the title of the employee, the First Circuit examined "the *actual* nature of [the employee's]

regularly assigned duties as a whole." *Id.* at 7 (quotation omitted) (emphasis in original). The First Circuit also rejected the use of the "primary duties" test from our opinion in *Farrell* because the Supreme Court stated in *Caputo* that workers who spend "at least some of their time in indisputably longshoring operations" are covered. *Id.* at 8 (quoting *Caputo*, 432 U.S. at 273). The First Circuit examined the totality of the claimant's job, and noted that serving as a runner, a covered job, constituted not "discretionary or extraordinary occurrences, but rather a regular portion of the *overall* tasks to which petitioner could have been assigned as a matter of course." *Id.* at 9.

Other Courts of Appeals have followed the same approach as the First Circuit and looked at the totality of the employee's duties to determine whether he was engaged as a maritime employee. For example, in *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346 (5th Cir. 1980), the Court of Appeals for the Fifth Circuit concluded that an employee who worked between 2.5 to 5 percent of his time in traditional longshoring operations was covered. *Id.* at 1348. The Fifth Circuit specifically rejected a "substantial portion" test—akin to our "primary duties" test in *Farrell*—because the Supreme Court's decisions in *Caputo* and *Ford* explained that only "some" of an employee's time must be in longshoring operations in order to be covered. *Id.* The Fifth Circuit was careful to note, however, that its "decision does not undertake to define the point at which a worker's employment in maritime activity becomes so momentary or episodic it will not suffice to confer status." *Id.*

Interestingly, Maher responds that the same aspect of *Caputo* upon which these Courts and Riggio rely supports its argument as well. Maher quotes our interpretation of *Caputo* in *Rock* in which we explained that the Supreme Court extended "coverage to an employee who throughout the day might have been assigned to unload a vessel but at the hour of

the accident had been temporarily assigned a task that might not have been covered under the Act." 953F.2d at 63. Maher seizes on our use of the phrase, "throughout the day," to suggest that we adopted a narrow conception of protection from shifting coverage solely to, in Maher's words, "employees who walk in and out of coverage throughout the work day."

This is a misreading of *Rock*. As explained above, we declined to find coverage in that case because the claimant had worked for two years exclusively in a non-covered position and was only "nominally subject to reassignment" 11 to a covered job. 953 F.2d at 67 n.17. We also stated that *Caputo* "protects those employees who walk in and out of coverage on a frequent basis" and that *Caputo* followed the clear intent of the statute, "which was in part to avoid the shifting coverage caused by an employee's constant movement during the workday between land and sea." *Id.* In *Rock*, the claimant could not show that there was any real possibility of him working in a covered job.

Riggio's employment history is very different from that of the claimant in *Rock*; it more closely resembles those of the claimants in *Levins* and *Boudloche*. Because Maher stipulated at oral argument that Riggio spent half of his time employed as a checker, the mere fact that he was not employed in a covered position on the day of his injury, or even in the two weeks previous, does not call into question the conclusion that Riggio's regular duties involve spending "at least some of his time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273. Further, Riggio was actually subject to reassignment as a checker, unlike the claimant in *Rock*, and the evidence does not support the conclusion that Riggio's engagement in maritime employment was "so momentary or episodic" as to be insufficient to confer coverage. *Boudloche*, 632 F.2d at1348.

In a final attempt to deny Riggio coverage, Maher argues that we should not look at the employee's overall employment history when conducting the coverage analysis and cites to the Court of Appeals for the Ninth Circuit's decision in *McGray Construction Co. v. Director, OWCP*, 181F.3d 1008 (9th Cir. 1999) for support. The facts in *McGray*, however, are easily distinguished from the case at bar. The claimant in *McGray* had been engaged in maritime employment in the past but had been subsequently hired by a different employer for a non-maritime job. The Ninth Circuit concluded that the claimant was not covered by the Act because it is impractical for an employer to know the prior work history of its employees and it would be unfair to treat employees working for an employer exclusively on a non-maritime job differently depending on this history. *Id.* at 1016. These concerns are not present in the instant case because it covers only Riggio's work history while employed by Maher, which should know that it routinely assigns Riggio to maritime employment.

We believe that the proper analysis requires us to look at the "regular portion of the overall tasks to which [the claimant] could have been assigned as a matter of course," *Levins*, 724 F.2d at 9, to determine whether he spends "at least some of [his] time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273. Because Riggio spent half of his time as a checker and his overall duties included assignment as a checker, an indisputably longshoring job, he is covered under the Act even though he worked as a delivery clerk on the day of his injury. The petition for review of the Board's decision will be denied.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

U.S. DEPARTMENT OF LABOR
Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

[Filed June 28, 2001]

BRB No. 00-960

VINCENT J. RIGGIO,
Claimant-Petitioner,

v.

MAHER TERMINALS, INCORPORATED,
Self-Insured Employer
Respondent.

DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Before: HALL, *Chief Administrative Appeals Judge*, SMITH and McGRANERY, *Administrative Appeals Judges*.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (1994-LHC-1948) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has come before the Board. The facts are not in dispute. Claimant is a clerk/checker for employer. He belongs to the checker's local, and he is on employer's permanent hire list, but he is not on a specified job list, so he can be assigned any work. Tr.1 at 38, 42-43, 47. Claimant has worked for employer in an office setting as a clerk as well as in the field and in the lanes as a checker. *Id.* at 45-48. On February 3, 1994, claimant was working as a delivery clerk in an office on Berth 62 of employer's facility in Port Shipley. He injured his shoulder when he pushed his chair back from the desk and one of the rollers got caught, tipping the chair. *Id.* at 36. Employer paid claimant benefits under the state workers' compensation law. Claimant filed a claim for benefits under the Act.

The sole issue before Administrative Law Judge Ainsworth Brown was whether claimant satisfied the Act's status requirement. Judge Brown found that claimant is a delivery clerk who falls within the clerical exclusion of Section 2(3)(A), 33 U.S.C. § 902(3)(A), and that even if he "had occasional forays into the lanes," he did not change his status from that of a clerical worker. Decision and Order at 3. Moreover, Judge Brown found that, as claimant did not submit more than the two weeks of employment records submitted by employer, and as his legal arguments were not persuasive, claimant failed to meet his burden of proving that he has maritime status. Therefore, Judge Brown denied benefits. *Id.* Claimant appealed.[1]

The Board rejected claimant's assertion that his duties as a delivery clerk, which involve paperwork and computer work in an office setting, but are related to loading and unloading, are sufficient to confer status. *Riggio v. Maher Terminals, Inc.*, 31 BRBS 58 (1997). However, the Board held that it

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[1] The Director, Office of Workers' Compensation Programs (the Director), filed a response brief in support of claimant's position.

could not affirm Judge Brown's decision, as he thrice stated that claimant "occasionally" worked as a checker but concluded that claimant is an office-bound delivery clerk excluded from coverage. The Board stated that if claimant occasionally worked as a checker, then he did not work "exclusively" as an office clerk and the Section 2(3)(A) exclusion does not apply. *Id.* at 61. Consequently, the Board vacated the denial of benefits and remanded the case for further consideration using the proper standards. *Id.* at 61-62.

On remand, the case was assigned to Administrative Law Judge Ralph A. Romano (the administrative law judge). The administrative law judge first stated that the Board's decision was not to be interpreted as an order to automatically find in favor of claimant. Instead, he reviewed the decisions in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992), *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476, 5 BRBS 393 (3d Cir. 1977), and *Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993), for guidance. The administrative law judge read *Caputo* as conferring coverage on a clerk only when that clerk is subject to maritime reassignment, such as a checker, during the course of his workday, and that to read it otherwise is to go beyond its scope. Therefore, the administrative law judge denied claimant coverage, as claimant had not shown he was subject to reassignment as a checker in the same day he worked as a clerk. He also noted that claimant's past work as a checker was insufficient to show coverage under *Caputo*. Decision and Order on Remand at 3. Claimant again appeals the denial of benefits, and employer responds, urging affirmance.

Claimant contends the administrative law judge misinterpreted the law, as he required reassignment to maritime work, or the potential for such, within one work day in order to confer coverage. Employer asserts this is a valid interpretation of the Supreme Court's holding and the law as set

forth by the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises. Before addressing the legal issues of this case, it is helpful to examine claimant's duties in more detail.

In this case, claimant testified that he worked as both a checker and a clerk. As such, he handled paperwork for both in-coming and out-going cargo. When claimant worked as either a delivery or a receiving clerk, his work was exclusively in an office. When claimant worked as a checker, he worked in the lanes and the field. He would check seals and container numbers as well as license plate numbers, generating a document verifying that all was in order.[2] Tr.1 at 38-41, 45-46, 48, 50-52, 55-56, 62-65. Claimant estimated his time was divided evenly between the two types of work. He also testified that he has worked for two or three years in Berth 80 as a receiving or delivery clerk and that his supervisor would assign him work as a clerk whenever he could, but if he could not, claimant would go into the lanes or do other checker jobs. Tr.1 at 48-49. If no work is available at employer's facility, claimant obtains work through the union hall as a checker or a clerk. Tr.1 at 76.

Judge Brown questioned the veracity of claimant's testimony with regard to his work duties.[3] Decision and Order at

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[2] Claimant noted that clerks earn more than checkers because they use computers and add figures, and checkers do not, and he conceded he prefers office work. Tr.1 at 43, 48, 55-56.

[3] Claimant testified he worked outdoors as a checker once during the week before he was injured, although on the date of the injury, he was working as a delivery clerk in an office. Tr.1 at 49-50, 65. On cross-examination, employer presented records which established that claimant worked solely as a delivery clerk between January 25 and February 4, 1994, the two weeks prior to his injury. Emp. Ex. 1; Tr.1 at 59-62. Although he presented no records to corroborate his assertions, claimant then testified that he may have mistaken the time period, but that he does occasionally work as a checker and did so as recently as a few days before the hearing. Tr.1 at 61-62.

2-3. Due in part to this credibility issue, the Board remanded this case for reconsideration. *Riggio*, 31 BRBS at 61-62. On remand, employer conceded that claimant is subject to assignment as a checker and that he occasionally worked as a checker. Tr.2 at 25. The administrative law judge noted this concession and concluded that the decision was no longer affected by "Judge Brown's doubts as to the integrity of Claimant's testimony" regarding his duties. Decision and Order on Remand at 2 n.5. Thus, there remains no dispute that claimant could be assigned by and occasionally works for employer as a checker. The issue before the Board, therefore, is whether the administrative law judge correctly interpreted and applied *Caputo* to this case arising in the Third Circuit.

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by Section 3(a) and that his work is maritime in nature and is not specifically excluded by the Act. 33 U.S.C. §§ 902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996). Thus, in order to demonstrate that jurisdiction exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Construction Co., Ltd.*, 30 BRBS 81 (1996).

Generally, a claimant satisfies the "status" requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96(CRT) (1989). To satisfy this requirement, he need only "spend at least some of [his] time in indisputably longshoring operations." *Caputo*, 432 U.S. at

273, 6 BRBS at 165. Although an employee is covered if some portion of his activities constitute covered employment, those activities must be more than episodic, momentary or incidental to non-maritime work.[4] *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990). Restating the *Schwalb* test, the Third Circuit deems activities "maritime" if they are "an integral or essential part of the chain of events leading up to the loading, unloading, or building of a vessel." *Rock*, 953 F.2d at 67, 25 BRBS at 121(CRT). Employees who are hired exclusively to perform office clerical work are specifically excluded from coverage, 33 U.S.C. § 902(3)(A);[5] *Stone*, 30 BRBS at 213, even if their work is integral to the loading or construction of ships.

Under the Act, checkers have maritime status. *Caputo*, 432 U.S. 249, 6 BRBS 150; *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24(CRT) (1st Cir. 1984); *see also Stone*, 30 BRBS at 211 n.4. Office-bound delivery clerks who process

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[4] An "episodic" activity is one which is "discretionary or extraordinary" as opposed to one which is "a regular portion of the overall tasks to which a claimant may be assigned. . . ." *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24(CRT) (1st Cir. 1984); *see also McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997); *Stone*, 30 BRBS at 213.

[5] Section 2(3)(A) provides:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include—
>
> (A) individuals employed *exclusively to perform office clerical*, secretarial, security, or data processing *work* [if such persons are covered by State workers' compensation laws];

33 U.S.C. § 902(3)(A) (emphasis added).

paperwork for the release of cargo are not covered. *Farrell*, 548 F.2d 476, 5 BRBS 393; *Stone*, 30 BRBS at 213; *Sette*, 27 BRBS 224. In a case where these jobs were combined, and the claimant was subject to reassignment as a checker, the Board held that the employee is covered. *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989).

Claimant first contends the administrative law judge erred in concluding he is an excluded clerical worker. Rather, he asserts that his occasional work as a checker removes him from the Section 2(3)(A) exclusion and brings him within the Act's coverage. The facts establish that claimant is on employer's permanent hire list and is assigned work as an office clerk. If there is no clerical work available, claimant may be assigned to work as a checker, and it is undisputed that claimant occasionally works for employer as a checker. Because Section 2(3)(A) excludes those "individuals employed exclusively to perform office clerical . . . work[,]" 33 U.S.C. § 902(3)(A), and because it is undisputed claimant occasionally works as a checker, his work for employer is not *exclusively* office clerical work, and he is not excluded from coverage by Section 2(3)(A). Unlike the situations in *Farrell* and *Sette* where office-bound clerks were excluded from coverage, *Farrell*, 548 F.2d at 478, 5 BRBS at 396; *Sette*, 27 BRBS at 228-229, the distinguishing factors present in *Caldwell*, 22 BRBS 398, where the claimant regularly worked as a checker outside the office, are present here. Thus, as it is undisputed that claimant's regular work assignments for employer include assignment as a checker, as we stated in our prior decision, Section 2(3)(A) is inapplicable. *Jannuzzelli v. Maersk Container Service Co.*, 25 BRBS 66 (1991) (Clark, J., dissenting); *Caldwell*, 22 BRBS 398; *compare with Ladd v. Tampa Shipyards, Inc.*, 32 BRBS 228 (1998); *Stone*, 30 BRBS at 211. As claimant spent "some of his time" working for employer in covered longshoring activities, he is a covered employee. *Ford*, 444 U.S. 69, 11 BRBS 320; *Caputo*, 432 U.S. 249, 6 BRBS 150. Therefore, we reverse the

administrative law judge's decision to exclude claimant from coverage based on his office clerical work.

Ordinarily, the fact that claimant regularly worked as a checker and is thus not excluded from coverage would end our inquiry into coverage. However, in this case, the administrative law judge created an additional requirement that claimant prove he was subject to reassignment to maritime work within the same work day in order to be covered.[6] Therefore, we must address claimant's contention that the administrative law judge erred in interpreting case precedent to establish a "same day of injury" test.[7] In response, employer asserts that the administrative law judge has correctly interpreted the relevant cases.

In finding that claimant is not a covered employee, the administrative law judge declined to read *Caputo* as

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[6] The administrative law judge noted that there was no evidence claimant was ever reassigned to checker or other traditional longshore duties during any work day when he worked as a clerk. Decision and Order at 2, n.4. There is, however, also no evidence claimant could not be so reassigned. In the initial appeal in this case, we found it unnecessary to address the Director's argument that Section 20(a), 33 U.S.C. § 920(a), 33 U.S.C. § 920(a), applies in the resolution of the case, noting that the Board has consistently held it does not apply to legal issues relating to coverage. *Riggio,* 31 BRBS at 62, n.4. However, Section 20(a) presumes, "in the absence of substantial evidence to the contrary . . . that the claim comes within the provisions of the Act." Thus, questions of fact underlying coverage may well be subject to Section 20(a), placing the burden of production of employer. *See Fleischman v. Director, OWCP,* 137 F.2d 131, 32 BRBS 28(CRT)(2d Cir. 1998), *cert. denied,* 119 S.Ct. 444 (1998). We need not fully explore this issue here, as this case is resolved based on the legal analysis.

[7] Resolution of the case before us does not raise the issue of the how much time claimant spent, or needed to spend, performing longshore work to satisfy the status requirement. Therefore, we need not address claimant's argument that he should be held to a lower "quantum of time" in covered employment because his non-covered clerical work has a strong nexus to maritime operations.

extending coverage to employees unless they are subject to reassignment to covered work on the same day they are assigned to non-covered work. The administrative law judge focused on the fact that neither claimant in *Caputo* was a clerk. One employee, Blundo, was working as a checker when injured and was covered. The other employee, Caputo, was working as a terminal laborer, and with regard to "the day" Caputo was hired and injured, the court stated:

> In that capacity, he could have been assigned to any one of a number of tasks necessary to the transfer of cargo between land and maritime transportation. . . . Not only did he have no idea when he set out in the morning which of these tasks he might be assigned, but in fact his *assignment could have been changed during the day.* Thus, had Caputo avoided injury and completed loading the consignee's truck on the day of the accident, he then could have been assigned to unload a lighter. Since it is clear that he would have been covered while unloading such a vessel, *to exclude him from the Act's coverage in the morning but include him in the afternoon* would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate.

Caputo, 432 U.S. at 273-274, 6 BRBS at 165-166 (emphasis added) (citations omitted). The administrative law judge also cited *Rock* in summarizing employer's argument that a claimant normally subject to reassignment is not covered. In this regard, in discussing *Caputo*, the Third Circuit stated:

> The [Supreme] Court sought to avoid the "shifting coverage" that the amendments attempted to eradicate by extending coverage to an employee who *throughout the day* might have been assigned to unload a vessel but at the hour of the accident had been temporarily assigned to a task that might not have been covered under the Act.

Rock, 953 F.2d at 62, 25 BRBS at 116-117(CRT) (emphasis added). The *Rock* court also noted:

> Although the Director notes that Rock was officially subject to reassignment to longshoring positions and argues that under [*Caputo*], this fact entitles Rock to coverage, the Director misinterpreted [*Caputo*]. The Court in [*Caputo*] sought to prevent the hazards of shifting coverage by *covering employees who at one moment might be involved in loading but at another moment might be finishing that job and starting another that would not be covered.* The Court was following the clear intent of the statute, which was in part to avoid the shifting coverage caused by an employee's constant *movement during the workday* between sea and land. The [*Caputo*] position cannot be stretched to cover Rock, who voluntarily chose a position that would no longer involve him in the dangers of loading and unloading, and whose only occupation in the two years in which he held his new job was to drive the courtesy van. [*Caputo*] *protects those who walk in and out of coverage on a frequent basis, not those who are nominally subject to reassignment.*

Rock, 953 F.2d at 67 n.17, 25 BRBS at 121 (CRT) n.17 (emphasis added). Contrary to the administrative law judge's analysis, these cases do not support the administrative law judge's creation of a "same day of injury" status test, particularly when the language quoted above is placed in context.

In *Caputo*, the Supreme Court addressed whether claimant Caputo, a member of a stevedoring gang who had been hired for the day as a terminal laborer and was injured while engaged in the non-maritime work of loading a truck, was a covered employee. The Supreme Court held that he met the status requirement based on his overall employment. In reaching its decision, and pertinent to the case herein, the

Court rejected the notion that a claimant must be covered at the "moment of injury." It stated:

> *The Act focuses primarily on occupations*—longshoreman, harbor worker. . . . Both the text and the history demonstrate a *desire to provide continuous coverage throughout their employment* to these amphibious workers who, without the amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they spend *at least some of their time* in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity.

Caputo, 432 U.S. at 273, 6 BRBS at 165 (emphasis added). Thus, although Caputo was injured during the performance of non-maritime work, he was covered because his occupation was longshoring. The Court continued its discussion with the example, quoted above, of a worker whose assignments could be changed within the course of one work day. However, it did not limit coverage to only those employees whose duties changed during a day as opposed to those assigned different tasks day by day. Rather, the Court used this example to demonstrate how incongruous application of a "moment of injury" test could be if an employee's afternoon work was covered but his morning duties were not. The same is true if an employee is covered Monday through Thursday, but happens to be assigned to load trucks all day Friday. Both employees perform the same occupation, that of a longshoreman, and are engaged in maritime work "some of the time." To read the *Caputo* language as limiting consideration of an employee's activities to a 24-hour period is to render moot the express focus on *occupations*. In addition, it converts the Court's holding that coverage extends to those who spend "some of their time" in longshoring operations

to a requirement that they spend "some of the day" in such work.

Further support that "status" is an occupational test can be found in the Supreme Court's decision in *Ford*, 444 U.S. 69, 11 BRBS 320. In that case, the Supreme Court reiterated its rejection of the "point of rest" theory and held that two land-based workers involved in intermediate steps in the loading process were covered employees. The Court stated that "[i]n adopting an occupational test that focuses on loading and unloading, Congress anticipated" that some land-based "workers doing tasks traditionally performed by longshoremen" would be covered. *Ford*, 444 U.S. at 80, 82, 11 BRBS at 326, 328. Moreover, instead of making the coverage determination based upon which union the worker is in or upon "the employer's whim" in assigning work, "the crucial factor is the nature of the activity to which a worker may be assigned." *Id.*, 444 U.S. at 82-83, 11 BRBS at 328-239. There was no discussion of limiting consideration of work assignments to those within a specified time period.

Moreover, in following *Caputo*, the circuit courts have not restricted the occupational test focusing on whether a worker spends "some of the time" in maritime work to situations where the maritime work was on the same day. The United States Court of Appeals for the Eleventh Circuit, in *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990), affirmed the Board's holding that a chassis and container repairman was a covered employee. In addressing this issue, the Eleventh Circuit discussed the Supreme Court's *Caputo* decision, stating:

> Finding that the worker who was injured while loading trucks on land *could have been assigned, on any day*, to unload a vessel at the pier, the Court determined that he

> was therefore covered under the LHWCA for his purely land-based activities.

Coleman, 904 F.2d at 615, 23 BRBS at 104 (CRT) (emphasis added). As Coleman's overall duties facilitated the movement of cargo, because part of his time was spent in repairing chassis and containers used within the port facility, even though he was injured on a day he was assigned to repair a truck bound inland, he was covered. Additionally, in *Levins*, 724 F.2d 4, 16 BRBS 24(CRT), the United States Court of Appeals for the First Circuit reversed the Board's decision and held that a book clerk who usually worked in an office but occasionally performed the duties of a checker was a covered employee. It stated that the issue of status must be resolved by looking to "the *actual* nature of [the claimant's] regularly assigned duties as a whole," that is, those to which he may be assigned "as a matter of course," as opposed to his title, classification or his primary duties. *Id.*, 724 F.2d at 7, 9, 16 BRBS at 30, 33(CRT) (citing *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981) (emphasis in original)). In *Levins*, the claimant's job required him to be physically present at the terminal during the loading and unloading of ships under 300 tons as well as to inspect cargo on an as needed basis. Thus, his "regular" clerical duties included tasks similar to those of a checker, although such work was not necessarily performed daily or even weekly. Accordingly, his title of "book clerk" did not preclude coverage as review of his occupation demonstrated that he regularly performed duties which were not "discretionary or extraordinary occurrences, but rather a regular portion of the *overall* tasks to which petitioner could have been assigned as a matter of course." *Id.*, 724 F.2d at 9, 16 BRBS at 33(CRT) (emphasis in original). In *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990), the United States Court of Appeals for the Fifth Circuit affirmed the Board's holding

that a structural fitter, who was injured while setting a floor, was a covered employee, as his regular duties included performing undeniably maritime activities, and his injury on a day when he performed non-maritime work did not divest him of coverage.

Cases previously decided by the Board also support claimant's position that the administrative law judge interpreted *Caputo* too narrowly. For example, in *Zeringue v. McDermott, Inc.*, 32 BRBS 75 (1998), the Board held that a bulldozer operator, injured during the course of non-maritime work, was covered because he spent some time, once every two to four months, using the bulldozer to assist in barge load-out operations. In *Jones v. Aluminum Co. of America*, 31 BRBS 130 (1997), the Board held that the decedent was a covered employee because his work maintaining and repairing the conveyor system used to unload bauxite, although infrequent, was a regular, non-discretionary part of his job, meeting the "some of the time" requirement. In *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997), the Board concluded that a clerical employee, who was injured at his desk, was a covered employee because, although it occurred only once in the year before his injury, he was required to assist in the unloading process when his supervisor was absent. Similarly, a clerk-checker, who worked as a clerk but then was temporarily assigned by his employer as a checker for a period of eight or nine months, and was still subject to such reassignment upon returning to his duties as a clerk, was a covered employee. *Caldwell*, 22 BRBS 398. In *Thornton v. Brown & Root, Inc.*, 23 BRBS 75 (1989), the Board held that a crane rigger, who worked on the construction of offshore platforms and who was injured while dumping materials off a truck, was a covered employee because seven to ten times per year, as needed, he helped in load-out operations.

The common thread is whether the claimant performs maritime duties as a regular portion of his overall duties. *Dobey v Johnson Controls*, 33 BRBS 63 (1999) (traffic officer who alternated as marine policeman covered); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997) (crane operator subject to regular maritime assignments covered); *Ljubic v. United Food Processors*, 30 BRBS 143 (1996) (maintenance supervisor with maritime duties covered); *Jannuzzelli*, 25 BRBS 66 (office clerk required to clock in dock workers covered); *Wuellet v. Scappoose Sand & Gravel Co.*, 18 BRBS 108 (1986) (mining facility welder/mechanic subject to assignment at barge facility covered). Provided the employee is required to perform some maritime work as a part of his regular duties, it is his overall occupation, and not his specific daily activities, which brings him within the Act's coverage.

Despite such overwhelming precedent, employer argues that the Third Circuit's comments in *Rock* demonstrate that the administrative law judge properly interpreted the *Caputo* ruling. However, reliance on *Rock* for creation of a "same day of injury" test is also misplaced. There is no indication in *Rock* that the Third Circuit intended to create a "daily" test. In *Rock*, the Third Circuit was faced with the issue of whether a courtesy van driver, who transported passengers within the marine terminal and had performed this job for several years, was a covered employee. In deciding the case, the court examined Supreme Court decisions, as well as its previous decisions, and it concluded there must be "some nexus between the employee's activities and either cargo-handling or shipbuilding. . . ." *Rock*, 953 F.2d at 65, 25 BRBS at 119(CRT). Despite acknowledging a "slight nexus with the loading process" because Rock occasionally transported longshoremen, nevertheless the Third Circuit determined that a courtesy van driver is not covered by the Act because his job is "too remote" from the loading and unloading process. *Rock*, 953 F.2d at 65-66, 25 BRBS at 119-120(CRT).

In discussing *Caputo* in *Rock,* the court stated that the Supreme Court sought to avoid a shifting coverage problem to a worker whose duties changed "throughout the day." *Rock*, 953 F.2d at 62, 25 BRBS at 116-117(CRT). This statement reflects the facts relating to claimant Caputo's job rather than a shift from the *Caputo* Court's occupational focus. Additionally, in addressing the Director's argument that Rock was subject to reassignment as a longshoreman and should be covered, the Third Circuit noted that *Caputo* protects those who "walk in and out of coverage on a frequent basis[.]" *Rock*, 953 F.2d at 62 n.17, 25 BRBS at 121 n.17(CRT). To infer that these phrases give rise to a "same day of injury" test by requiring an employee to be assigned maritime work at least part of every day to be covered is to read them out of context.[8] The specific facts in *Rock* demonstrated that the possibility of claimant's walking in and out of coverage was remote. The court noted that although Rock may have been subject to reassignment as a longshoreman due to his union membership, such reassignment possibilities were nominal, as the evidence established that he had not been assigned maritime work for two years. As Rock essentially had little or no likelihood for reassignment, the Third Circuit was unwilling to confer coverage on the slim possibility that he could be reassigned. *Id.* These facts distinguish *Rock* from the present case, as claimant was actually assigned work as a checker and thus meets the occupational test as a longshoreman. The claimant in *Rock,* with no such reassignments, was not covered because his occupation as a van driver lacked a sufficient nexus to loading operations.

We also reject employer's assertion that the Supreme Court, in its decision in *Harbor Tug & Barge Co. v. Papai*,

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[8] In *Rock*, the Third Circuit favorably cited the First Circuit's decision in *Levins* wherein the claimant, on some days, performed the duties of a checker. *Rock*, 953 F.2d at 65, 25 BRBS at 119(CRT).

520 U.S. 548, 31 BRBS 34(CRT) (1997), eliminated the *Caputo* occupational test, making room for the administrative law judge's "same day of injury" test. Initially, *Papai* is distinguishable in that it arises under the Jones Act, 46 U.S.C. §688(a), and not the Longshore Act, and the two are mutually exclusive. Because the two statutes were not designed in conjunction to serve the same purpose, they need not be reconciled or interpreted in the same way. *Erlenbaugh v. United States*, 409 U.S. 239 (1972); *Jones v. Aluminum Co. of America*, __ BRBS __, BRB Nos. 00-696/A (April 9, 2001); *Powers v. Sea Ray Boats, Inc.*, 31 BRBS 206, 211-212 (1998). The decision in *Papai* does not address the occupational test under the Longshore Act at all, as it is simply not relevant to the case or the test for coverage under the Jones Act. Moreover, the cases differ on the facts. In *Papai*, the Court addressed whether an employee, hired for the day to paint a docked tug boat, was a "seaman" under the Jones Act. The Supreme Court determined that Papai was not a "seaman" under the Jones Act, as he did not have a substantial connection to a vessel, or fleet of vessels owned by a common employer, in navigation. *Papai*, 520 U.S. at 560, 31 BRBS at 37, 39(CRT). While Papai had been hired by this employer a number of times during the 2.5 years preceding his injury, his engagements were discrete and separate from the one in question, and although he may have worked as a seaman in the past for this or other employers, his work was not on a fleet of vessels under common ownership or control. Thus, rejecting the use of a multiple employer test, the Court held that Papai's work as a seaman prior to his injury did not establish coverage under the Jones Act for this injury.

The decision of the United States Court of Appeals for the Ninth Circuit in *McGray Construction Co. v. Director, OWCP*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999), similarly does not support employer's position in this case. In *McGray Construction*, claimant Hurston was working as a pile driver/pier construction worker on a non-maritime

project for employer when he was injured. Although he had a history of being hired out of a union hall and working on maritime projects for other employers, the Ninth Circuit stated that such history does not make Hurston a maritime employee where he is hired specifically for a non-maritime job. The court reasoned that Hurston was "engaged" by his employer for a particular non-maritime job as a pile driver/construction worker, and "engaged," as used by the Act, means "engaged on this job." The non-maritime duties were his sole duties on this project for this employer, and consequently, Hurston was not "walking in and out of coverage" during this employment as if he were hired by an employer to perform both maritime and non-maritime tasks. Consequently, the Ninth Circuit rejected a multiple employer test, citing *Papai* and holding claimant Hurston could not obtain longshore coverage merely because of his long history of working in maritime jobs for various employers where the job for which he was hired by the employer, and on which he was injured, was exclusively non-maritime. *McGray Construction*, 181 F.3d at 1014-1016, 33 BRBS at 86-87(CRT). The court in no way limited the nature of the work inquiry to a particular day, but limited it to the nature of the work to be performed for a particular employer. It is undisputed here that employer assigned claimant both checker and clerical work.

In summary, we agree with claimant that the administrative law judge erred in creating a "same day of injury" status test. Such a test is not supported by law and too nearly resembles the defunct "moment of injury" theory. The administrative law judge's test ignores the occupational focus on claimant's overall employment. As he was assigned to work as a checker by employer as a part of his regular duties for employer, claimant is covered by Section 2(3).

Accordingly, the administrative law judge's Decision and Order on Remand is reversed. The case is remanded to the administrative law judge for consideration of any remaining issues.

SO ORDERED.

/s/_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/_____
ROY P. SMITH
Administrative Appeals Judge

/s/_____
REGINA C. McGRANERY
Administrative Appeals Judge

APPENDIX C

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DATE: June 19, 2000

CASE NO.: 1994-LHC-01948

OWCP NO.: 02-113391

BRB NO.: 96-1136

In the Matter of

VINCENT J. RIGGIO
Claimant

v.

MAHER TERMINALS, INC.
Employer

DECISION AND ORDER ON REMAND

The Benefits Review Board (the BRB) has remanded this case because it could not affirm the decision of Judge A. Brown that Claimant was statutorily[1] excluded from coverage by reason of his work as a receiving/delivery clerk at Employer. Such decision is said to be inconsistent with the evidence that Claimant was subject to reassignment to, and/or actually worked as, a checker at Employer, citing *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989).

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[1] 33 U.S.C. 902(3)(A).

Predictably, Claimant urges adoption of the BRB's inability to affirm the absence of status, i.e. urges that status be found to have been established.[2]

Employer argues that the Third Circuit Court of Appeals[3] has put this issue to rest, holding that a clerk who ". . . [has] in the past . . . worked as a checker . . ." (Farrell, at 478), and/or is ". . . nominally subject to reassignment"[4] (*Rock*, at note 17), is not entitled to status.[5]

The BRB remand order ". . . for further consideration using the proper standards", is not interpreted as a *pro forma* return of this case for entry of a decision in Claimant's favor (Transcript, at 4-7).

In *Sette*, supra, the BRB acknowledged that *Farrell*, supra, as re-eonfirmed in *Rock*, supra, directs a finding of no status where an employee performs once clerical duties exclusively. The BRB, however, apparently withheld its acceptance of *Farrell*, and *Rock* insofar as those holdings suggest that an employee who ". . . spent some of his time at work [at] other than . . . clerical duties" was not covered, citing to its holding in *Caldwell v. Universal Maritime Service Corp.*, supra, where the employee working in an office was subject to

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[2] Claimant's alternative theory that a clerk's duties, being integral to the loading and unloading process, confer status, is not addressed herein, as the BRB unequivocally rejected that claim, citing *Sette v. Maher Terminals*, 27 BRBS 224 (1993).

[3] Maher Terminals v. Farrell, 548 F.2d 476 (1977); Sea-land Service v. Rock, 953 F.2d 56 (1992).

[4] There is no evidence that Claimant was ever reassigned to checker or other traditional longshore duties during any work day while working as a clerk.

[5] Employer concedes that Claimant had worked occasionally as a checker, and that he was subject to reassignment as a checker (Transcript, at 25). Thus, Judge Brown's doubts as to the integrity of Claimant's testimony as to the details of his work-duty history do not impact on the decision reached here.

reassignment as a (covered) checker. The Supreme Court's decision in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977) is said to have justified this conclusion (*Sette*, at FN 2, FN 4).

Neither of the employees in *Caputo* were involved in any way with the duties of a clerk, as was Claimant here.[6] One was a checker, and the other a member of a gang hired as a terminal laborer. The checker was found to have been involved in a task integral to the unloading process, and thus covered. The terminal laborer was subject to reassignment ". . . to any one of a number of tasks necessary to the transfer of cargo between land and maritime transportation, including stuffing and stripping containers, loading and discharging lighters and barges, and loading and unloading trucks", and his assignment ". . . could have changed during the day" (*Caputo*, at 273-4). He was found covered since had he not been injured while loading a truck in the morning (a task not covered), but then injured while unloading a vessel (a covered task) in the afternoon, status would have been (anomalously) conferred while he was doing his afternoon chores, but denied while he was doing his morning chores (*Caputo*, at 214).

The holding in *Caputo* informs resolution of the instant case only insofar as its analysis of the terminal laborer, since the checker there was not involved in any movement between/among jobs.

I find that to read *Caputo* as conferring coverage upon a clerk subject to reassignment (but not during the same day) as a checker (as here),[7] where *Caputo*, conferred coverage upon

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[6] At FN 34, the Court notes the *Farrell* Court's rejection of the conclusion that a clerk's function was such an integral part of longshoring operations to be a covered job, since such conclusion ". . . showed no concern with the fact that the employee did not handle cargo."

[7] Or, to read *Caputo* as conferring coverage upon a clerk, who, on some days, has worked as a checker.

a terminal laborer who unloaded trucks but was subject to reassignment on the same day he unloaded trucks to other (cargo handling) traditionally acknowledged longshore duties, goes beyond the reach of *Caputo*.

Accordingly, in applying the standards proper to resolution of the subject issue, I find Claimant lacked the status requirement necessary for coverage under the Act.

ORDER

Based upon the foregoing, the claim of Vincent J. Riggio is DENIED.

/s/ Ralph A. Romano
Ralph A. Romano
Administrative Law Judge

DATED: June 19, 2000
Camden, New Jersey

APPENDIX D

U.S. DEPARTMENT OF LABOR
Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

[Filed May 27, 1997]

BRB No. 96-1136

VINCENT J. RIGGIO,
Claimant-Petitioner,

v.

MAHER TERMINALS, INCORPORATED,
Self-Insured
Employer Respondent,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Before: HALL, *Chief Administrative Appeals Judge*, SMITH and McGRANERY, *Administrative Appeals Judges*.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (94-LHC-1948) of Administrative Law Judge Ainsworth H. Brown rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence,

are rational, and are in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant testified he is a clerk/checker for employer. He belongs to the checker's local. Although he is on employer's permanent hire list, he is not on a specified job list, and he testified he can be assigned work as either a clerk in an office or a checker in the lanes or the field. Tr. at 38, 42-43, 45-48. On February 3, 1994, claimant was working as a delivery clerk in an office on Berth 62 of employer's facility in Port Shipley. He injured his shoulder when he pushed his chair back from the desk and one of the rollers got caught, tipping the chair. *Id.* at 36. Employer paid claimant benefits under the state workers' compensation law. Claimant filed a claim for benefits under the Act.

The sole issue before the administrative law judge was whether claimant satisfied the status requirement set forth in Section 2(3) of the Act, 33 U.S.C. § 902(3) (1988). The administrative law judge found that claimant is a delivery clerk who falls under the clerical exclusion of Section 2(3)(A), 33 U.S.C. § 902(3)(A) (1988), and that even if he "had occasional forays into the lanes," he did not change his status from that of a clerical worker. Decision and Order at 3. Thus, the administrative law judge found that claimant failed to meet his burden of proving that he is covered under the Act. *Id.* Claimant appeals the denial of benefits, and the Director, Office of Workers' Compensation Programs (the Director), responds, in agreement with claimant. Employer responds, urging affirmance.

Claimant contends the administrative law judge erred in denying benefits. Specifically, claimant contends the administrative law judge erred in finding him to be an excluded clerical employee pursuant to Section 2(3)(A) of the Act because his work as a clerk bears a close functional relationship with the loading and unloading process. Moreover, claimant asserts that he is covered under the Act because of

his work as a checker. The Director argues in favor of claimant, initially contending that the Section 20(a), 33 U.S.C. § 920(a), presumption should be applied to the "coverage determinative facts;" thus, he argues, the burden of persuasion lies on employer to prove that claimant is not a maritime employee. The Director also argues that the administrative law judge erred in denying benefits as a matter of law, as his findings of fact establish that claimant worked some of the time as a checker—an indisputably longshore activity that is not excluded. Employer argues that the administrative law judge properly relied on *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476, 5 BRBS 393 (3d Cir. 1977), and on *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112 (CRT) (3d Cir. 1992), to conclude that claimant's work as a delivery clerk does not bring him into the realm of coverage, as that type of work does not expose him to the longshore hazards contemplated by Congress in conferring coverage.

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by Section 3(a) and that his work is maritime in nature and is not specifically excluded by the Act. 33 U.S.C. §§ 902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). Thus, in order to demonstrate that coverage exists, a claimant must satisfy the "situs" and the "status" requirements of the Act.[1] *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Construction Co., Ltd.*, 30 BRBS 81 (1996).

---

[1] Employer conceded that the situs requirement was met in this case. Decision and Order at 2.

Generally, a claimant satisfies the "status" requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989). To satisfy this requirement, he need only "spend at least some of [his] time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165. The United States Court of Appeals for the Third Circuit, which has jurisdiction over this case, deems activities "maritime" if they are "an integral or essential part of the chain of events leading up to the loading, unloading, or building of a vessel." *Rock*, 953 F.2d at 67, 25 BRBS at 121 (CRT). Employees who are hired exclusively to perform office clerical work are specifically excluded from coverage. 33 U.S.C. §902(3)(A) (1988);[2] *Stone*, 30 BRBS at 213. Both claimant and the Director contend that claimant's duties as a checker prevent him from being considered "exclusively clerical."

In this case, claimant testified that he worked as both a checker and a clerk. Claimant testified that when he worked as a clerk, his work was exclusively in an office. As a receiving clerk, he would receive the report generated by the checker and enter the information into a computer. As a delivery clerk, he would enter information into the computer from the delivery order and generate a report to clear the cargo for land transport. Claimant was injured while working

---

[2] Section 2(3)(A), 33 U.S.C. § 902(3)(A) (1988) (emphasis added), provides:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include—
>
> > (A) individuals employed *exclusively to perform office clerical*, secretarial, security, or data processing *work* [if such persons are covered by State workers' compensation laws].

as a clerk. Claimant stated that when he worked as a checker, he worked in the trucking lanes and on the pier receiving and delivering containers to a ship in conjunction with crane operations. He would check seals and container numbers as well as license plate numbers, generating a document verifying that all was in order. Tr. at 38-41, 45-46, 48, 50-52, 55-56, 62-65. He noted, however, that clerks earn more than checkers because they use computers and add figures and checkers do not. *Id.* at 43, 55-56. Claimant stated that his time was divided evenly between the two types of work. He testified that he prefers working as a clerk and that his supervisor assigns him this work whenever he can. If claimant is unable to obtain a clerk position, he accepts work as a checker. *Id.* at 48-49, 76.

The administrative law judge questioned claimant's credibility, stating:

> It is clear from the testimony that the Claimant's recollection of work in the lanes immediately preceding the injury is incorrect and his reference to a 50/50 split of his time may be viewed as suspect as well. It is not an accurate appraisal of his testimony to say that it is "undisputed" as his veracity was directly challenged on cross-examination with telling effect and not rehabilitated on redirect.

Decision and Order at 2-3.[3] The administrative law judge, however, acknowledged three times in his decision that

---

[3] Claimant testified that sometime during the week before he was injured, he worked outdoors as a checker, although on the date of the injury, he was working as a delivery clerk in an office. Tr. at 49-50, 65. On cross-examination, employer presented records which established that claimant worked solely as a delivery clerk between January 25 and February 4, 1994. Emp. Ex. 1; Tr. at 59-62. Claimant then testified that he may have mistaken the time period, but that he does occasionally work as a checker and did so as recently as a few days before the hearing. Tr. at 61-62. In light of claimant's erroneous recollection of his work just prior to the injury, the administrative law judge viewed claimant's testimony concerning the rest of his work history as suspect. Decision and Order at 2-3.

claimant functioned "on occasion" as a checker. Despite this acknowledgment, he concluded that claimant failed to establish his "status" by a preponderance of the evidence. Therefore, he found that claimant is a clerical worker excluded from coverage. *Id.* at 2-3.

Checkers are covered under the Act. *Caputo*, 432 U.S. at 249, 6 BRBS at 150; *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24 (CRT) (1st Cir. 1984); *see also Stone*, 30 BRBS at 211 n.4. A claimant employed exclusively as an office-bound delivery clerk who processes paperwork for the release of cargo, however, is not covered under the Act as amended in 1984, even if his work is integral to the ship-building, ship repair or loading/unloading process. *Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993); *see also Farrell*, 548 F.2d at 478, 5 BRBS at 396; *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); *Bergquist v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 131 (1989). We therefore reject claimant's contention that his duties as a delivery clerk, which solely involve paperwork and computer work in an office setting, though related to loading and unloading, are sufficient to confer status. *Sette*, 27 BRBS at 224.

Nevertheless, we cannot affirm the administrative law judge's finding that claimant is excluded from coverage. In a case where a claimant worked as an office clerk but was subject to reassignment as a checker, the Board held that he is covered. *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989). Thus, we hold that the administrative law judge erred in thrice stating that claimant "occasionally" worked as a checker but then concluding that claimant is an office bound delivery clerk excluded from coverage. If claimant occasionally works as a checker, he is not "exclusively" a clerical employee, and the exclusion in Section 2(3)(A) is not applicable. *Caldwell*, 22 BRBS at 398. By acknowledging claimant's work as a checker but finding this

did not change his "preferred status" as a delivery clerk, it appears the administrative law judge applied a "moment of injury" or "substantial portion" test to this case. Both standards have been rejected. *Caputo*, 432 U.S. at 273, 6 BRBS at 165; *Levins*, 724 F.2d at 4, 16 BRBS at 24 (CRT); *Schwabenland v. Sanger Boats*, 683 F.2d 309, 16 BRBS 78 (CRT) (9th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981). A person is "engaged in maritime employment" under Section 2(3) if he spends "at least some of [his] time" engaged in maritime work. *Ford*, 444 U.S. at 83 n.18, 11 BRBS at 328 n.18; *Caputo*, 432 U.S. at 273-274, 6 BRBS at 165; *McGoey v. Chiquita Brands International*, ___ BRBS ___, BRB No. 96-593 (Jan. 28, 1997). Therefore, if claimant is subject to reassignment as a checker and/or occasionally worked as a checker, claimant's employment is covered under the Act. *Caldwell*, 22 BRBS at 398. Consequently, we vacate the denial of benefits, and we remand the ease for further consideration using the proper standards.[4] *Caputo*, 432 U.S. at 273-274, 6 BRBS at 165; *McGoey*, slip op at 2; *Caldwell*, 22 BRBS at 398.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

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[4] In light of our decision to remand this case for further consideration using the appropriate legal standard, we decline to address the Director's Section 20(a) argument. The Board has consistently held that the Section 20(a) presumption does not apply to the legal issues relating to coverage under the Act. *See Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *George v. Lucas Marine Construction*, 28 BRBS 230 (1994), *aff'd mem.*, No. 94-70660 (May 30, 1996); *Davis v. Doran Co. of Calif.*, 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989).

/s/ _____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ _____
ROY P. SMITH
Administrative Appeals Judge

/s/ _____
REGINA C. McGRANERY
Administrative Appeals Judge

APPENDIX E

U.S. Department of Labor

Office of Administrative Law Judges
2600 Mt. Ephraim Avenue
Camden, New Jersey 08104

In the matter of

VINCENT J. RIGGIO

Claimant — Case No. 94-LHC-01948

v. — OWCP No. 02-113391

MAHER TERMINALS, INC.
Employer

Appearances:

Philip J. Rooney, Esq.,
For Claimant

William M. Broderick, Esq. (oral hearing)
Richard P. Stanton, Jr., Esq. (post hearing brief)
For Employer

Before: Ainsworth H. Brown
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.*, (the "Act") and the regulations promulgated thereunder. A hearing was held before me in New York, New York on January 16, 1996 at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. Upon conclusion of the hearing, the record closed and closing arguments were received in late March and early May.[1]

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[1] The following references are used herein: TR for Hearing Transcript, EX for Employer's Exhibits, CX for Claimant's Exhibits, and DX for Director's Exhibits

Stipulations

The parties stipulated and, based on the record, I find that:

1. The Claimant sustained an injury arising out of and in the course of his employment on February 3, 1994.
2. There was an employee-employer relationship between the parties.
3. There was proper notice, but no lost time due to the injury.
4. Compensation was paid under state workers compensation law.
5. Sites requirement for coverage under the Act was conceded (33 U.S.C 903).

Findings of Fact and Conclusions of Law

The sole factual dispute concerns the status of the Claimant at the time of the injury.

The findings of fact and conclusions of law which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. The U.S. Supreme Court has now held that a Longshore Act claim has the burden of persuasion in proving factors of entitlement and can not benefit by the doctrine of true doubt in view of Section 7(c) of the Administrative Procedures Act (*Director, OWCP, DOL, v. Greenwich Collieries, and Director, OWCP v. Maher Terminals et al.* (___U.S.___, No. 93-744, decided 6/20/94). Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

The Claimant's work activity is as a delivery clerk, a job that involves receiving a delivery order and entering information from it into a computer that generates a document called a TIR. The activity is accomplished in an office. He has occasionally functioned as a checker, an activity that is a traditional "Longshore" job. He has testified that he belonged to the checker's union.

His work for employer concerns with the letter "N" in consideration of his seniority status and job availability. The work that he was assigned to in the office was an assignment he "preferred". He did both clerical receiving and delivery.

He was assigned work outside office in the "lanes". He testified that 50% of the time he was in the lanes about the time of his injury. It is clear from the testimony that the

Claimant's recollection of work in the lanes immediately preceding the injury is incorrect and his reference to a 50/50 split of his time may be viewed as suspect as well. It is not an accurate appraisal of his testimony to say that it is "undisputed" as his veracity was directly challenged on cross examination with telling effect and not rehabilitated on redirect.

From studying the cited authorities from the parties, the overriding policy consideration taking into account legislative intent as interpretated by the Benefits Review Board, the 3rd Circuit, and the Supreme Court is to remove the question of coverage from the chance of where one may find oneself , but to concentrate the focus on what one does, to wit, if it is clerical it is not a covered occupation because the "pushing of paper" does not subject one to maritime hazards. Thus, it appears to the undersigned that even if Mr. Riggio had occasional forays into the "lanes", that did not change his preferred status that he had achieved as a clerical worker.

The Claimant questions, possibly rhetorically, why six months' worth of Employer records were not provided in contrast to something like a little less than two weeks worth.

The burden of persuasion; however, is not on the Employer to disprove the element of "status", but, rather, it is upon the Claimant to adduce a preponderance of evidence on the question. If the Claimant believed that six months of records would be relevant then it had the opportunity through discovery to see that those records were available to be placed in the record.

The parties' cite several authorities as instructive in evaluating the disputed issue here. Understandably, the Claimant attempts to distinguish certain precedents that are not supportive of his position (in particular Maher Terminals, Inc. v. Farrell, 548 F.2d 476 (3rd Cir 1977) and *Sette v. Maher*, 90-LHC-0521 (1971 aff'd BRB No. 91-1920 (1993). The Claimant did not cite or discuss *Sealand Service v. Rock*, 953 F.2d 56 (3rd Cir 1992) . The Circuit court as noted by the Employer shows that *Farrell*, and not the favorable decision cited by the Claimant is the controlling law in the 3rd Circuit. The Employer's discussion of the legislative intent is also more insightful than anything offered by the Claimant in furtherance of its point that the intent of the 1984 Amendments was to be restrictive as to coverage questions.

The Claimant has failed in his burden of persuasion to prove that he possess the status of maritime employment so as to come within the purview of coverage under the Act.

ORDER

The claim by Mr. Riggio is DENIED.

/s/ Ainsworth H. Brown
Ainsworth H. Brown
Administrative Law Judge

Dated: May 20, 1996
Camden, New Jersey

Supreme Court, U.S.
FILED
SEP 26 2003
OFFICE OF THE CLERK

No. 03-312

In The
Supreme Court of the United States

MAHER TERMINALS, INC.,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, And VINCENT RIGGIO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT VINCENT RIGGIO IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

PHILIP J. ROONEY
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New York, New York 10038
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OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Is there jurisdictional status under the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWC") in the case of an employee who, for a given employer, spent 50 percent of his time in covered work, 50 percent of his time in non-covered work and was injured on a day in which he was engaged in non-covered work?

Did the circuit court have subject matter jurisdiction to entertain the petition for review of a non-final order when no petition for review was filed after issuance of a final order?

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RELEVANT STATUTES AND REGULATIONS

Section 902(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. provides:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship builder, and shipbreaker, but such term does not include –
>
> (a) individuals employed exclusively ~~to perform~~ office clerical, secretarial, security or data processing work;

29 C.F.R 18.51 (Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges) states:

STIPULATIONS

> The parties may by stipulation in writing at any stage of the proceedings, or orally made at hearing, agree upon any pertinent facts in the proceeding. It is desirable that the facts be thus agreed upon so far as and whenever practicable. Stipulations may be received in evidence at a hearing or prior thereto, and when received in evidence, shall be binding on the parties thereto.
>
> 29 C.F.R. 18.51

33 U.S.C. Section 921(a) states:

> *Effectiveness and finality of orders.* A compensation order becomes effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order

> are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.
>
> 33 U.S.C. 921(a)

33 U.S.C. 921(c), in relevant part, states:

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside.
>
> 33 U.S.C. 921(c)

COUNTER-STATEMENT OF THE CASE

Factual Background:

Mr. Riggio had been employed as a checker since 1978 and was a member of Local 1 of the LIA (clerks and checkers local). He was on Maher's permanent hire list but was not on a specific job list (App.3a). On any given day he could be assigned to work either as a clerk in the office or as a checker (Idem). In the period prior to his injury, Mr. Riggio spent 50 percent of his time working as a checker and 50 percent as a clerk, a fact stipulated to by the Employer (App.3a).

The Petition states that Mr. Riggio on any given day could be "hired" as a clerk or a checker (Petition pg. 5). The term "hired" is misleading because he worked for Maher whenever work was available, he was their steady employee, subject to assignment to differing tasks based

upon the employer's needs. He worked for other employers only when there was no work at Maher (App.17a).

The Petition states:

> Mr. Riggio was 'casual' day laborer provided to Maher through the union hiring call. Each day, Maher orders labor from a local union hiring hall (Petition pg. 4).

There is no support in the record either for the contention that he was a casual day laborer or that Maher each day ordered labor from a local union hiring hall. Maher maintains a list of permanent employees, either in general categories or for a specific job (App.3a).

Maher employed Mr. Riggio both as a checker and as a delivery clerk and split his time evenly between the two positions (App.3a) both as a clerk and a checker he handled the paperwork of both in-coming and out-going cargo (App.3a, 17a). As a checker he worked in the lanes or in the field, checking container numbers and the like, generating a document that all was in order (App.17a). As a delivery clerk, however, he handled the relevant paperwork while working exclusively in an office (App.3a, 17a). As a delivery clerk, he received a delivery order and if everything was proper and all charges paid, the clerk generated a document called a TIR which is given to the driver picking up the cargo who will go to the location listed on the document to pick up the container (App. On Appeal 58a).

Mr. Riggio was injured on February, 1994, on a day he was assigned to work by Maher as a delivery clerk (App.2a-3a).

Procedural History:

After formal hearing before Administrative Law Judge (hereinafter "ALJ") Ainsworth H. Brown the claim was denied on the basis of lack of maritime status (App.45-48a). This order was vacated by the Benefits Review Board (hereinafter "the Board") and the case remanded for further consideration utilizing the proper legal standard, in a decision filed May 27, 1997 (App.37-43a). On remand the matter appeared before ALJ Ralph A. Romano and the claim was again denied due to a claimed lack of status in a decision dated June 19, 2000 (App.33-36a).

The Board, in a Decision filed June 28, 2001, explicitly rejected the same day of injury test and found that there was status under the LHWC and remanded the case to the ALJ for consideration of any remaining issues (App.14-32a).

Maher thereupon filed a petition for review to the United States Court of Appeals for the Third Circuit in accordance with 33 U.S.C. 921(c). The Director, Office of Workers' Compensation Programs, United States Department of Labor, made an appearance in a proceeding and filed a motion to dismiss the petition for review on the basis that the Board's order was not a final decision. Thereafter the director withdrew from further participation in the case. During the pendency of the petition for review, the employee submitted to ALJ Romano a stipulation, signed by the parties, providing, in the event of a finding of jurisdiction, for a schedule loss of 4% of the left arm, minus benefits paid under the Workers' Compensation Law of the State of New Jersey and providing for an attorney's fee to the Employee's attorney. In an initial

order Judge Romano approved the stipulation but characterized it as a settlement. Upon motion of the Employer, Judge Romano issued a subsequent order approving the stipulation but not denominating it as a settlement. No petition for review relative to that decision was filed either with the Board or the circuit court. At oral argument before the circuit court on February 24, 2003, the court entertained oral argument both relative to the Director's motion to dismiss the petition (argued by the undersigned in the absence of the Director) and on the merits of the issue of status under the LHWC.

The United States Court of Appeals for the Third Circuit, in a decision filed February 29, 2003, denied the petition for review (App.1-13a) and denied the Director's motion to dismiss the petition (App.5-6a, footnote 3). The court reasoned that since the order was final (because of Judge Romano's Approval of the stipulation) by the time the court considered the petition, that it had jurisdiction to entertain same.

The Employer's petition for writ of certiorari ensued.

ARGUMENT

POINT I

THE EMPLOYEE HAS THE REQUISITE STATUS AND IS COVERED UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

The legal issue presented in this case is whether a worker who, based upon the record and conceded facts in this case, develops 50% of his time to concededly maritime activity and 50% of his time to concededly non-covered

activity has the requisite status under the LHWC, when he is injured while engaged in non-covered activity. Both the Board and the Third Circuit took the view that such an employee is covered and that relying, in part, on this Court's holding in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

The Employer maintains that there is no coverage for such an employee unless on the very day of injury, he is assigned to covered work.

Caputo does not address the precise issue presented in this case but is significant for its interpretation of Congressional intent for uniformity of coverage. Thus:

> Both the test and the history demonstrate a desire to provide continuous coverage throughout their employment to those amphibious workers who, without their 1972 Amendments would be covered for part of their activity. It seems clear, therefore, that when congress said it wanted to cover "longshoreman" it had in mind persons whose employment is such that they spend *at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments would be covered for only part of their activity.*

Northeast Marine Terminal v. Caputo, 432 U.S. at 273 [emphasis supplied]. See also S.Rep. 13; H.R. Rep. 10-11 U.S. Code Cong. and Admin. News, 4708 ("The intent of the Committee is to permit a uniform compensation system to Apply to employees who would otherwise be covered by this Act for part of their activities").

Shortly thereafter, this Court made clear that the term "maritime employment" in 32 U.S.C. 902(3) was an occupational rather than a geographic concept. *P.C.*

Pfeiffer Co. v. Ford, 444 U.S. 69, 80 (1979). In that case, this court stated that the crucial factor in determining LHWC coverage " . . . is the nature of the activity to which the worker *may* be assigned," 444 U.S. at 82 [emphasis supplied]

and

> Our observation that Ford and Bryant were engaged in maritime employment at the time of their injuries does not undermine the holding of *Northeast Marine Terminal Co.* . . . . that a worker is covered if he spends some of his time in indisputably longshoring operations . . .
>
> 444 U.S. at 83 note 18.

In other words, those workers would still be covered even if, at the time of injury, they were not involved in longshoring operations.

In *Chesapeake and Ohio Railway v. Schwalb*, 493 U.S. 40 (1989) this Court held that employees involved in the maintenance of equipment essential to the loading and unloading process were covered by the LHWC. As they were employed by a railway company and presumably spent some portion of their time in non-covered occupations, Justice O'Connor, in a separate concurring opinion, noted that it was not essential to the court's holding that they were engaged in maritime activities at the moment of injury.

In the instant case, it is conceded that the Employee's work as a checker is covered employment, *Northeast Marine Terminal v. Caputo*, cited above. By the same token, his employment as a delivery clerk in the office

(even though bearing a close nexus to longshoring operations) is not covered, *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 (3rd Cir. 1976).

Contrary to the Employer's assertion, the Employee was not hired on a daily basis but was on Maher Terminals' permanent hire list (App.3a).

The circuit courts have consistently held that an employee who regularly performs maritime duties is covered even if injured while performing non-maritime duties. What has been at issue is the quantum of covered activity that is necessary to confer jurisdiction. The Third Circuit had initially adopted a "primary function" test, *Maher Terminals, Inc. v. Farrell*, cited above. However, in the instant case, the Third Circuit has modified its holding in light of this Court's holding in *Caputo* and the holdings of other circuit courts. Even utilization of a "substantial" portion test, has been rejected by circuit courts utilizing this Court's test of "at least some" time involved in longshoring operation, *Boudloche v. Howard Trucking Co., Inc.*, 632 F.2d 1346 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981).

The First Circuit has adopted a test that a covered employment is a "regular portion" of claimant's employment, *Graziano v. General Dynamics Corporation*, 663 F.2d 340 (1st Cir. 1981). In a later case, the First Circuit made clear that the concept of "regularly assigned duties" is not referring to the amount of time involved in covered employment but whether or not it was a regular feature of the employmee's work duties, *Levins v. Benefits Review Board*, 724 F.2d 4 (1st Cir. 1983).

The Fifth Circuit has held that an employee may establish the status based on either his duties on the date

of injury or the maritime nature of his work as a whole, *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843 (5th Cir. 1989).

The Fourth Circuit affirmed coverage in a case in which an employee spent 15% of his time in covered activities, noting the issue was the employee's occupation as a whole and not the particular duties performed at the time of injury, *In Re C.S.S. & Sugar X Transportation, Inc. [Shivers]*, 151 F.3d 164, (4th 1998), cert. denied, 119 S. Ct. 547 (1998).

In *Odem Construction Co., Inc. v. U.S. Department of Labor*, 622 F.2d 110 (5th Cir. 1980) cert. denied, 450 U.S. 966 (1981), the court found jurisdiction based upon the moment of injury test but also noted that jurisdiction could independently have been found because 20% of the employee's work activities were maritime in nature.

It is further to be noted that the circuit courts have held that employment is not covered when it is episodic, momentary or incidental to non-maritime work, *Coleman v. Atlantic Container Services, Inc.*, 904 F.2d 61 (11th Cir. 1990); *Sea-Land Services, Inc. v. Rock*, 953 F.2d 56 (3rd Cir. 1992).

Clearly, a case in which 50% of the claimant's overall employment duties are maritime in nature satisfies any of the tests promulgated by the circuit courts as to the quantum of maritime employment needed to confer coverage.

POINT II

THE THIRD CIRCUIT'S HOLDING IS CONSISTENT WITH THAT OF OTHER CIRCUIT COURTS AND THIS COURT

The Third Circuit, in substance held, that the coverage issue is determined by the overall nature of the claimant's regularly assigned work duties only with Maher Terminals, with whom he enjoyed a permanent employment relationship.

Maher argues that this approach is contrary to this Court's holding in *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997) and to the Ninth Circuit holding in *McGray Construction Co. v. Director, OWCP,* 181 F.3d 1008 (9th Cir. 1999). The Third Circuit properly held that these cases were not of relevance to the facts of this case.

There is one common factual element in *McGray* and *Papai*. In both cases the employee was hired out of a union hall to be temporarily employed, in the case of Mr. Papai for one day. The respective courts also addressed a common argument made in both cases: that the issue of coverage should be determined by the nature of the employment duties with all of the different employers for whom the employees had worked in prior periods. In both cases, that argument was rejected. The Ninth Circuit reasoned that a given employer should be able to predict, when he retains an employee on a given day, whether that individual is or is not a maritime employee. This Court has previously arrived at the same conclusion:

> When the inquiry further turns on whether the employee has a substantial connection to an

> identifiable group of vessels, common ownership or control is essential for this purpose.

Harbor Tug & Barge Co. v. Papai, cited above, at 558.

The coverage inquiry as to whether an individual is a seaman under 46 U.S.C. 688(a) (Jones Act) or a longshoreman are analogous, i.e., in some ways different and in some ways the same.

The inquiry as to seaman status is twofold: do the employee's duties contribute to the function of the vessel or the accomplishment of its mission and does the employee have a connection to a vessel or group of vessels that is substantial in terms of duration and nature.

The injury need not occur on the ship nor need the injury arise out of employment with the ship. It is only required that the injury occur while in service to a ship or fleet, *Chandris, Inc. v. Latsis,* 515 U.S. 347 (1995).

The test the coverage under the LHWC differs because an employee status can be determined by work duties at the time of injury, even if the overall employment is not maritime, e.g., bridge building, *Gilliam v. Wiley & Jackson Co.*, 659 F.2d 54 (5th Cir. 1981), cert. denied, 459 U.S. 1170 (1983). On the other hand, if an employee at the time of injury, is not performing maritime work, (as herein), but some portion of his overall work is maritime in nature, then the status requirement is satisfied, *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978); *Levins v. Benefits Review Board*, 724 F.2d 4 (1st Cir. 1984).

However, at one level the test of seaman versus longshoremen manifests exactly the same policies: 1. The overall duties with the employer (or ship or fleet) at the

time of injury are relevant and 2. a strong policy of continuity throughout employment of coverage or non-coverage, *Northeast Marine Terminal, Inc. v. Caputo*, cited above, *Harbor Tug & Barge Co. v. Papai*, cited above.

POINT III

THE EMPLOYEE IS NOT EXCLUDED FROM COVERAGE BY REASON OF 33 U.S.C. 902(3)

Section 2(3) excludes from the term employees, among others:

> Individuals employed *exclusively* to perform office clerical, secretarial, security, or data processing work;

33 U.S.C. 902(3)(A) [emphasis supplied].

Purely clerical workers were intended by Congress to be excluded by reason of the 1972 amendments, H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess. 11 (1972)). Prior to the 1984 amendments the Third Circuit excluded from coverage an employee who worked exclusively as a delivery clerk, *Maher Terminals, Inc. v. Farrell,* 538 F.2d 476 (3rd Cir. 1977).

The intent of Congress, relative to the 1984 amendments respecting office work, appears intended, by its plain reading to exclude from coverage certain workers who may be on a maritime situs and whose work may contribute to maritime purposes but are not exposed to maritme hazards. For example, prior to the 1984 amendments, security guards had been found to be covered under the LHWC, *Holcomb v. Robert W. Kirk & Associates, Inc.* 655 F.2d 589 (5th Cir. 1981), cert. denied, 459 U.S. 1170

(1983); *Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672 (2nd Cir. 1981), cert. denied, 454 U.S. 386 (1981).

More significantly, Congress stated with utmost clarity its intent for continuity or non-continuity of coverage. Thus:

> The Committee intends that these exemptions be applied in an "either-or" fashion – that either the worker is not covered because he or she is engaging exclusively on work which would qualify for an exemption; or because that worker is not exclusively and solely engaged in work which qualifies for the exemption. The Committee firmly believes that the situation in which the worker may be covered at one time and not covered at another, depending upon the nature of the work which the worker is performing at the time of injury must be avoided since such a result would be enormously destabilizing and thus would defeat one of the essential purposes of these amendments.

U.S. Code, Congressional and Administrative News, 98th Congress, 2nd Session, 2736-7.

and

> Thus, for example, as a clerical worker employed by the Stevedore performed clerical work both in the office and on the pier; wharfs or the warehouses, the exemption from coverage by this definition should not be applicable to such worker, and that worker should be covered by the Longshore Act *in all phases of employment.*

Id. at 2736 [emphasis supplied].

By its plain terms, Mr. Riggio is not subject to the exemption of 2(3)(a) because he was not employed by Maher exclusively as a delivery clerk in the office but was also employed as a checker in the field. Congress specifically addressed the situation such as his and specifically stated that such employees should be covered in all phases of employment. Again, the flawed underlying premise of Maher's argument is that only his work on the day of injury should be considered not his overall employment duties with Maher.

Congress stated that one of the purposes of the 1984 amendments was to address "present actuarial and underwriting uncertainties" 1984 USCCAN, 98th Congress, 2736. Congress is expressing a concern that an employer should be able to predict whether a given employee is subject to coverage by a state workers' compensation policy or the far more expensive coverage under the LHWC. In other words, the employer should pay a premium on a given employee's salary either for state or longshore coverage. However, this goal could not be accomplished were the employee to walk in and out of coverage on a daily or even a weekly or monthly basis. Congress has stated, with the utmost clarity, its intent that a given employee should be covered under the LHWC in all phases of employment for a given employer or not covered at all.

POINT IV

IT IS QUESTIONABLE IF THE CIRCUIT COURT HAD SUBJECT MATTER JURISDICTION TO ENTERTAIN THE PETITION FOR REVIEW[1]

In the instant case, the Petition for Review was filed after the Benefits Review Board issued an order finding jurisdiction and remanding this case to the Administrative Law Judge to consider remaining issues, no award of benefits having been made.

Thereafter, the Administrative Law Judge approved a substantive stipulation awarding the Employee compensation payments. Maher filed a Petition for Review neither with the Benefits Review Board nor with the Circuit Court relative to that decision. The court below denied a motion to dismiss because a final order had been issued prior to its consideration of the case.

The Employee recognizes the practicality of the approach taken by the Third Circuit but questions if it is permissible.

In the case of an appeal from the District Court pursuant to 28 U.S.C. 1291, the applicable rule, for example, permits an appeal to be filed after the announcement of the decision but prior to the entry of the judgment, Fed. R. App. P. 4(a)(2); *Schroeder v. McDonald,* 55 F.3d 454 (9th Cir. 1995). However, in the instant case, we are dealing with potential appeals at two different appellate levels:

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[1] Respondent Riggio did not raise this issue in a separate Petition for a Writ of Certiorari because he was not aggrieved by the final decision below.

Board and the circuit court. We are also dealing with a different statute, one containing very specific provisions relative to finality and petitions for review, 33 U.S.C. 921.

The statutes Congress enacts relative to the taking of appeals are regarded as matters of subject matter jurisdiction and are subject to a strict interpretation, *Browder v. Director, Dept. of Corrections*, 434 U.S. 257 (1978); *Finley v. U.S.*, 490 U.S. 545 (1989).

Section 921(a) provides that a compensation order becomes final, unless proceedings for the suspension of setting aside of the order are instituted in accordance with subdivision (b) of that section, i.e. a petition to the Benefits Review Board. A "compensation order" may be made only by a deputy commissioner or administrative law judge, 33 U.S.C. 919(c), (d) and shall be filed in the office of the deputy commissioner, 33 U.S.C. 919(e).

In the instant case, the compensation order making an award was never appealed to the Benefits Review Board. Section 921(a) by its plain terms provides that is the only method of preventing such an order from becoming final.

921(c) permits any party affected or agrees by a final order of the Board to obtain review in the court of appeals for the circuit in which the injury occurred.

The order of the Board was not final and not appealable. The employer had no obligation to file a petition for review until a final order was issued. The courts have taken a strict view as to what constitutes a final order for purposes of appeal, *Browder v. Director, Department of Corrections*, 434 U.S. 257 (1979), *Finley v. U.S.* (cited

above), *Eisen v. Carilisle & Jacquelne*, 417 U.S. 905 (1974).

ALJ Romano's function in approving the stipulation submitted by the parties was not merely ministerial or making a final award of damages. The stipulation submitted to the ALJ addresses itself to substantive issues in the case and he could approve the stipulation only if it were supported by evidence submitted by the parties. In fact, Judge Romano initially misconstrued this stipulation and denominated it as a settlement, requiring a request for clarification by Maher.

Judge Romano's second order approving the stipulation was the final order in this case. No proceedings to set it aside were undertaken.

The case of *National Steel & Shipbuilding Co., Inc. v. Director, OWCP*, 703 F.2d 417 (9th Cir. 1983) has been interpreted as permitting a direct appeal to the Circuit Court of an ALJ's decision after remand by the Board. The facts of the case do not support so broad an interpretation. The Board had affirmed the employer's appeal of an award for permanency and remanded the case for consideration of the period of temporary disability. The circuit court dismissed the employer's petition for review as being interlocutory. Thereafter, the ALJ issued an order declining any further benefits and the circuit court entertained the second petition for review. However, it was the first decision awarding permanency that was the subject of the appeal. The employer was not aggrieved by the second decision in its favor. Therefore, the Circuit Court was actually reviewing the first decision of the Board. In the instant case, the Employer did not file a petition for review

after the monetary award was made although it clearly was aggrieved by that award.

If sections 921(b)(3) (appeal to the Board) and 921(c) (appeal to the circuit court) are considered in isolation, an argument could be made for the Third Circuit's position. Even then, the proposition would be questionable because the circuit court has jurisdiction only to entertain the petition for review of a final order when said petition is filed "within 60 days following the issuance of such Board Order", 921(c).

But when 921(a) is considered, the holding of the Third Circuit is highly questionable. A compensation order becomes final unless it is appealed to the Board.

Finally, it should be noted that the Eleventh Circuit disagrees with the Third Circuit herein and does not permit a direct appeal to the court of appeals absent an appeal to the Board of the final decision, *RMK-BRJ v. Brittain,* 832 F.2d 565 (11th Cir. 1987). In that case the Board had reversed an ALJ's decision and remanded the cases for awards. The employer did not appeal the subsequent ALJ decision to the Board but sought review directly in the circuit court, arguing that the original ALJ decision was correct. The court held it had jurisdiction only to entertain a final decision of the Board.

The LHWC simply does not permit the filing of a petition for review to the circuit court prior to the issuance of a final order of the tribunal below, unlike the Federal Rules of Appellate Procedure.

CONCLUSION

It is respectfully submitted that the Petition herein relative to maritime status under 33 U.S.C. 902(3) should be denied. The intervention of this Court may be required relative to the issue of subject matter jurisdiction pursuant to 33 U.S.C. 921(c). In the event of a denial of the Petition or other final disposition favorable to the Employee, it is requested that attorney's fees and expenditures be assessed against the Employer pursuant to 33 U.S.C. 928(a) and (c).

Respectfully submitted,

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Supreme Court, U.S.
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No. 03-312

In the Supreme Court of the United States

MAHER TERMINALS, INC., PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that an employee listed on a shipping employer's permanent hire list and who regularly performed both covered and non-covered maritime work for that employer was covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, even though on the day of his injury he was performing non-covered maritime work.

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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 330 F.3d 162. The decisions and orders of the Benefits Review Board (Pet. App. 14a-32a, 37a-44a) are reported at 35 Ben. Rev. Bd. Serv. (MB) 104 and 31 Ben. Rev. Bd. Serv. (MB) 58. The decisions and orders of the administrative law judges (Pet. App. 33a-36a, 45a-48a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2003. The petition for a writ of certiorari was filed on August 26, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) provides compensation for work-related injuries that cause the disability or death of covered employees. 33 U.S.C. 908, 909. To be covered by the LHWCA, an injured employee must meet two requirements. The first, known as the status requirement, is that the employee must be engaged in maritime employment. The second, known as the situs requirement, is that the injury must have occurred on a maritime site. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 264-265 (1977). This case concerns the status requirement, which is set out in the LHWCA's definition of a covered "employee" as:

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include—
>
> (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work * * *.

33 U.S.C. 902(3).[1]

2. Respondent Vincent Riggio (respondent) had worked for petitioner Maher Terminals, Inc. for two or

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[1] Section 3(a) of the Act, setting out the situs requirement, specifies that a disability or death is compensable only if it "results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. 903(a). Petitioner has conceded that the situs requirement was satisfied. Pet. App. 46a.

three years at its marine terminal before he fell off a chair in an office and injured his arm. Pet. App. 2a, 17a. Respondent had worked for petitioner as both a checker and a delivery clerk and evenly split his time between the two activities, although he was working as a delivery clerk when the injury occurred. *Id.* at 3a. Checkers are covered under the LHWCA because they work in the shipping lanes, whereas delivery clerks are not covered because they work exclusively in an office. Pet. 5-6; Pet. App. 3a, 9a. Both jobs involve handling paperwork for incoming and outgoing cargo. Pet. App. 3a.

Respondent, who belonged to the International Longshoremen's Association (ILA) local for clerks and checkers, was on petitioner's permanent hire list, but he was not assigned to a specific job. Pet. 5; Pet. App. 3a. Thus, on any given day, he could be assigned work as a checker or as a delivery clerk. Pet. App. 3a.[2] When petitioner had no work available, respondent was permitted to obtain work through the union hall with other waterfront employers covered by the ILA/New

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[2] The record is unclear whether respondent was subject to reassignment from one position to the other during the course of a particular workday, although petitioner asserts that he could not be reassigned on a given day. Pet. 6 (relying on statement from court of appeals that "*the company argues* that [respondent] is not covered by the Act because on the day of his injury he was working as a delivery clerk and was not subject to reassignment") (quoting Pet. App. 2a) (emphasis added); but cf. Pet. App. 12a (describing respondent's employment with petitioner as "actually subject to reassignment as a checker"). The Benefits Review Board found no evidence in the record indicating whether respondent could be reassigned during the course of a workday. Pet. App. 21a n.6. Amici National Association of Waterfront Employers *et al.* contend that same-day reassignment would violate the terms of the collective bargaining agreement. Amici Br. 5 n.4.

York Shipping Association collective bargaining agreement. Pet. 5.

3. Respondent filed a claim for disability benefits under the LHWCA as a result of his injured left arm. After a hearing, an administrative law judge (ALJ) ruled in petitioner's favor. In determining status, the ALJ found not credible respondent's testimony that he worked 50% of his time as a checker, and ruled that respondent's occasional employment in the shipping lanes as a checker did not transform his clerical work as a delivery clerk into covered activity. Pet. App. 47a.

The Benefits Review Board vacated and remanded. Pet. App. 37a-44a. Because the ALJ had found that respondent occasionally worked as a checker, it ruled that respondent could not have been working "exclusively" as a delivery clerk, as the Section 902(3)(A) clerical employee exclusion requires. In the Board's opinion, the ALJ had incorrectly required that the employee must be working in covered activity at the "moment of injury" or that a "substantial portion" of his work must be covered maritime activity. Pet. App. 43a. Consequently, it remanded to determine whether respondent was "subject to reassignment as a checker and/or occasionally worked as a checker," in which case his employment would be covered. *Ibid.*

On remand to a different ALJ, petitioner "conceded that claimant is subject to assignment as a checker and that he occasionally worked as a checker." Pet. App. 18a. The ALJ ruled, however, that respondent had failed to meet the status test. *Id.* at 35a. While recognizing that respondent was subject to reassignment as a checker on other days, he nonetheless determined that a delivery clerk could be covered only if he were subject to reassignment to covered work during the course of a single workday. *Id.* at 35a-36a. Because respondent

had failed to establish that he was subject to same-day reassignment, the ALJ denied coverage. *Ibid.*

The Board again reversed and remanded. Pet. App. 14a-32a. It reaffirmed its prior ruling that because respondent regularly worked for petitioner as a checker, he had "spent 'some of his time'" in covered longshoring activities, and therefore was a covered employee. *Id.* at 20a (quoting *Caputo*, 432 U.S. at 273). The Board explained that, "[p]rovided the employee is required to perform some maritime work as a part of his regular duties, it is his overall occupation, and not his specific daily activities, which brings him within the Act's coverage." *Id.* at 28a. In addition, the Board distinguished *Sea-Land Serv. Inc.* v. *Rock*, 953 F.2d 56 (3d Cir. 1992), because there was only a "slim possibility" that the claimant in that case (a van driver) could be reassigned to maritime work. Pet. App. 29a. It likewise distinguished *Harbor Tug & Barge Co.* v. *Papai*, 520 U.S. 548 (1997), and *McGray Construction Co.* v. *Director, OWCP*, 181 F.3d 1003 (9th Cir. 1999), primarily on the grounds that those cases held that an employee may not establish the requisite status by reference to his work history with other employers; instead, status turns primarily on the duties applicable to a worker's present employment. See Pet. App. 29a-31a. The Board therefore reversed and remanded "for consideration of any remaining issues," *id.* at 32a, and petitioner appealed to the court of appeals.

4. The court of appeals affirmed.[3] The court observed that this Court in *Caputo* rejected the "moment

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[3] The Director moved to dismiss the appeal for lack of jurisdiction because the Board order remanded the case for further proceedings, and thus was not "final" within the meaning of 33 U.S.C. 921(c). In denying the motion, the court below ruled that the

of injury" status test, which bases coverage on the employee's duties at the time of injury, and instead found coverage for those persons "whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 amendments, would be covered for only part of their activity." Pet. App. 8a. In deciding whether a worker spends "some of his time" in longshoring work, the court below looked at "the regular portion of the overall tasks to which [the claimant] could have been assigned as matter of course." *Id.* at 13a (quoting *Levins* v. *Benefits Review Bd.*, 724 F.2d 4, 9 (1st Cir. 1984)); see *id.* at 10a-11a (relying on First and Fifth Circuit precedents). The court thus held that because respondent spent half his time as a checker and his overall duties included such work, he was covered under the Act even though he was working in non-covered work as a delivery clerk on the day of his injury. *Ibid.*

In so holding, the court of appeals distinguished its prior decision in *Sea-Land Serv. Inc.* v. *Rock*, *supra*, because there the claimant at the time of injury had worked for two years exclusively in non-covered employment and was only "nominally subject to reassignment" to a covered job. Pet. App. 12a (citation omitted). Therefore, there was no real possibility of his working in a covered job or moving in and out of coverage. *Ibid.*

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parties' stipulation on extent of injury and appropriate compensation, which was entered into after petitioner filed its petition for review in that court, Pet. App. 4a-5a, left no issues for the ALJ to decide, making the Board order "for all purposes final by the time the court was called upon to consider the petition." *Id.* at 5a-6a n.3 (quoting *Sea-Land Serv., Inc.* v. *Director, OWCP*, 540 F.2d 629, 631 n.1 (3d Cir. 1976)).

Similarly, the court below "easily distinguished" *McGray Construction Co.* v. *Director, OWCP*, *supra*, because the employee there, although having worked in maritime employment in the past, primarily for other employers, had been hired by McGray to perform exclusively non-maritime work. The court explained that the concerns motivating the Ninth Circuit's decision—namely, that it would be unfair to subject an unknowing employer to coverage under the Act and to treat differently non-maritime employees based on a prior, unrelated work history—were not present here, since petitioner routinely hired respondent for maritime employment. Pet. App. 13a.

ARGUMENT

The decision of the court of appeals is fact-bound and does not conflict with any decision of this Court or of any other court of appeals. Moreover, the court below may have lacked jurisdiction because the order of the Benefits Review Board under review was non-final. Accordingly, further review of the decision below is not warranted.

1. Contrary to petitioner's assertions (Pet. 8-18), the court of appeals did not adopt a standard for determining the status of an employee under the LHWCA that is different from the standard adopted by this Court or other courts of appeals. As the court below recognized, the status test, as set forth in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), covers those workers "whose employment is such that they spend at least some of their time in indisputably longshoring operations." Pet. App. 8a (citing *Caputo*, 432 U.S. at 273). Applying that test to respondent's employment with petitioner, the court considered the "regular portion of the overall tasks to which [respon-

dent] could have been assigned as a matter of course." *Id.* at 11a, 13a (citation omitted). This approach, the court observed, has been used by other courts of appeals, *id.* at 11a, and comports with the intent of the statute by protecting those workers who walk in and out of coverage on a frequent basis, *id.* at 12a. Because respondent was listed on petitioner's permanent hire list and regularly performed work as a checker (which is unquestionably covered longshoring work) as well as work as a clerk, the court concluded that he satisfied the *Caputo* status test.

Contrary to petitioner's contention, the court below did not base its holding on an "undefined period of prior work history." Pet. 10; see also Pet. 11-13. Rather, the court restricted its analysis of respondent's duties to the time when he was on petitioner's permanent hire list and regularly worked for petitioner. See Pet. App. 2a ("[W]e believe that we must look at the claimant's regular duties to determine whether he is engaged on a regular basis in maritime employment."); *id.* at 13a ("We believe that the proper analysis requires us to look at the 'regular portion of the overall tasks to which [the claimant] could have been assigned as a matter of course.'") (citation omitted); *ibid.* ("Because [respondent] spent half of his time as a checker and his overall duties included assignment as a checker, an indisputably longshoring job, he is covered under the Act even though he worked as a delivery clerk on the day of his injury.").

Petitioner's criticism of the court of appeals' decision appears to turn on the relevance of the fact that respondent was working as a clerk on the day of the injury. The court of appeals considered the entire period of respondent's work as an employee on petitioner's permanent hire list in determining his status, including

his work for petitioner as a checker, whereas petitioner argues that only respondent's work on the day of his injury should be relevant. It is undisputed, however—and this Court's *Caputo* decision makes clear—that if respondent had been hired to a permanent position and assigned to work some days as a checker and some days as a clerk, he would be covered by the LHWCA. See Pet. App. 10a-11a (discussing cases). The court of appeals evidently concluded that respondent's placement on petitioner's permanent hire list had the same practical effect as a permanent hire. *Id.* at 12a-13a.

Accordingly, the dispute in this case turns not on the legal standard applied by the court of appeals, but rather on the precise impact of the fact that an employee was listed on a shipping employer's permanent hire list. That fact-intensive issue does not warrant this Court's review. Indeed, that is particularly true in this case, because the record contains little if any information about the meaning and significance of an individual's inclusion on petitioner's permanent hire list.

2. Petitioner's contention that the decision below conflicts with the Ninth Circuit's decision in *McGray Construction Co.* v. *Director, OWCP*, 181 F.3d 1008 (1999), is mistaken. According to petitioner, the Ninth Circuit rejected "an overall employment history test," and instead "looked at the essential duties of the job for which the employee was hired when he was injured." Pet. 9. The court of appeals below, however, did not disagree with the legal standard applied by the Ninth Circuit in *McGray*, but rather found that the facts of *McGray* were "easily distinguished from th[is] case." Pet. App. 13a.

The claimant in *McGray* was working in non-maritime work exclusively when a crane load fell and seriously injured him. Relying on *Harbor Tug & Barge*

Co. v. *Papai*, 520 U.S. 548 (1997), the Ninth Circuit rejected a "common employer" theory, whereby the claimant's past maritime work with *other* employers and his hiring out of a maritime union hall determined maritime employment status. *McGray*, 181 F.3d at 1014-1015. Such a theory, the court stated, would go well beyond Congress's concern about maritime workers "walking in and out of coverage" and would lead to the conclusion that "once a person is a maritime worker for long enough, he remains one, even on a non-maritime job for a non-maritime employer." *Id.* at 1015. That approach would promote "striking unfairness" in the treatment of similarly-injured workers based on the fortuity of different employment histories and would "create a trap for the unwary employer who does not explore the work history of someone he hires." *Id.* at 1016. Accordingly, the court in *McGray* held instead that an employee's status turns on the "particular contract of employment" for which the worker was hired. *Id.* at 1015.

Nothing in *McGray* addressed the question presented in this case—namely, whether the same employer's regular employment of a worker in both covered and non-covered maritime work pursuant to the worker's placement on the employer's permanent hire list constitutes covered longshore activity, even when the work on the day of the injury was non-covered. Indeed, that is clear from the Ninth Circuit's statement that "the case at bar does not raise a question of one engaged to perform both maritime and non-covered work." *McGray*, 181 F.3d at 1015; see *Schwabenland* v. *Sanger Boats*, 683 F.2d 309, 312 (9th Cir. 1982) (holding that worker's "regular performance of maritime operations, even though it constituted less than a 'substantial portion' of his *overall working time*,

was sufficient to satisfy the status requirement") (emphasis added), cert. denied, 459 U.S. 1170 (1983). In essence, the court of appeals below treated the entire period of respondent's placement on petitioner's permanent hire list as the relevant employment engagement for purposes of determining status. Nothing in *McGray* is inconsistent with that fact-bound determination.[4]

3. Petitioner is also incorrect in asserting that the decision below is inconsistent with this Court's decision in *Harbor Tug & Barge Co.* v. *Papai*, 520 U.S. 548 (1997). *Harbor Tug* primarily concerned the question whether independent employers hiring out of a union hall could be treated as a common owner of a vessel or vessel fleet for Jones Act purposes. See *id.* at 556-557. In deciding that the "requisite link [of common ownership or control] is not established by the mere use of the same hiring hall which draws from the same pool of employees," the Court stressed that it would be difficult to predict Jones Act (or "perhaps" LWHCA) coverage when "prior employment with independent employers" was considered, and there would be "no principled basis for limiting which prior employments" were considered. *Id.* at 557-558.

Again, however, the court below did not consider respondent's employment history with all of the employers that used the same union hall to satisfy their daily employment needs. Rather, it considered only respondent's employment with petitioner during the period he was on petitioner's permanent hire list. The

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[4] Moreover, since the worker in *McGray* was a construction worker, the Ninth Circuit did not even consider the specific statutory exclusion at issue in this case: the Section 902(3)(A) exclusion for employees "exclusively" engaged as clerical workers.

court of appeals found the fact that respondent was regularly employed by petitioner in both covered and uncovered positions pursuant to his placement on the employer's permanent hire list to be determinative of status. Nothing in *Harbor Tug*, or any other decision of this Court, precludes such a factual determination.

4. Finally, the Court should deny the petition for a writ of certiorari because the court of appeals may have lacked jurisdiction to hear the case. Section 21(c) of the Act, 33 U.S.C. 921(c), gives the courts of appeals jurisdiction to review a "final order of the Board." This provision is jurisdictional, not subject to equitable tolling, and follows the contours of finality established under 28 U.S.C. 1291. See, *e.g.*, *Shendock* v. *Director, OWCP*, 893 F.2d 1458, 1464 (3d Cir.) (en banc), cert. denied, 498 U.S. 826 (1990); *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399, 406 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984). Accordingly, to be final, the Board order must have "end[ed] the litigation on the merits and le[ft] nothing for the court to do but execute the judgment." *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 521-522 (1988) (citation omitted).

The Board order at issue here finally resolved *only* the issue of coverage, and it remanded the case to the ALJ to resolve the question of compensation. Pet. App. 32a. Among the issues that remained to be determined were the extent (and perhaps the existence) of respondent's injury-related disability and the amount recoverable.[5]

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[5] A determination of the existence and amount of damages does not fall within any exception to the final judgment rule for purely ministerial functions. See *Sun Shipbuilding & Dry Dock Co.* v. *Benefits Review Bd.*, 535 F.2d 758 (3d Cir. 1976).

The court below nonetheless assumed jurisdiction based on a stipulation by petitioner and respondent as to those issues, even though the parties entered into that stipulation *after* petitioner filed the petition for review in the court below. Pet. App. 5a n.3. Generally, such a stipulation would not cure the initial defect of appealing a nonfinal Board order, nor would it render timely petitioner's otherwise premature petition for review. Cf. *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (holding, prior to the adoption of Fed. R. Civ. P. 4(a)(4), that a premature notice of appeal is a "nullity" and "is as if no notice of appeal [is] filed at all"); *id.* at 59 (observing "theoretical inconsistency" of conferring jurisdiction on court of appeals by filing a notice of appeal while retaining district court jurisdiction to consider motion to amend or alter judgment under Rule 59 motion); *Stone* v. *INS*, 514 U.S. 386, 396 (1995) (district court order becomes final if notice of appeal is filed one day before motion under Rule 59).[6] Because the court below may have erred in exercising jurisdiction over the case, granting the writ of certiorari would be improvident. *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976) (refusing to decide merits question where district court order was unappealable).

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[6] Petitioner could have avoided this jurisdictional problem by allowing the ALJ to issue, and the Board to affirm, a final order based on the stipulation, and then filing a petition for review in the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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IN THE

Supreme Court of the United States

MAHER TERMINALS, INC.,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS
U.S. DEPARTMENT OF LABOR and VINCENT RIGGIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PRELIMINARY STATEMENT

Petitioner seeks certiorari in order for this Court to decide the appropriate test for determination of employment status under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq*. Specifically, petitioner seeks clarification as to whether the appropriate inquiry is an analysis of the job duties of the job for which the worker was hired when injured (as held by the Ninth Circuit)[1] or an analysis of the entire period of employment with a particular employer without regard to the term of employment or

[1] The Ninth Circuit restricted the maritime status inquiry to the term of the employment for the job in which the worker was engaged when injured. *McGray Construction Co. v. Director, OWCP*, 181 F.3d 1008 (9th Cir. 1999).

contract of employment (as held by the Third Circuit). As discussed in detail in the brief of *amici* (*Amici Brief* pp. 8-10), this is an important question of federal maritime law which should be clarified by this Court. The Respondent Director appears to agree with Petitioner that the proper time period for the status inquiry is the "term of employment". Since this is not the holding of the Third Circuit, the Supreme Court should grant the Writ and resolve the conflict. At a minimum, Respondents' interpretations of the holding below and the holdings in *McGray Construction Co. v. Director, OWCP*, 181 F.3d 1008 (9th Cir. 1999) and *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 558 (1997) highlight the need for this Court to eliminate the confusion.

THE FACTS

Respondents acknowledge that Mr. Riggio was on Maher's permanent *hire* list (App. 3a) (Brief of Respondent Riggio p.2) (hereinafter "Riggio Br.") (Brief of Respondent Director p. 9) (hereinafter "Director Br.") but then go on to assert that Mr. Riggio enjoyed a permanent employment relationship with Maher (Riggio Br. p.10; Director Br. p. 9). This is not supported by the record. As stated in the petition, employment of all terminal labor (including clerks and checkers) in the Port of New York and New Jersey is governed by the Waterfront Commission of New York Harbor Rules and Regulations[2] and the Collective Bargaining Agreement between the New York Shipping Association, Inc. and the International Longshoremen's Association[3]. Pursuant to these documents, all terminal labor is casual. Being on a permanent hire list merely entitles the individual to receive first priority to be hired at a particular pier the following day

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[2] Codified at 21 NYCRR 1.1 *et seq.* (hereinafter "*WCNYHRR*").

[3] Administrative Law Judges are permitted to take judicial notice of the Collective Bargaining Agreement pursuant to the Federal Rules of Evidence, Rule 201.

depending on the needs of the operator of that pier. See, generally *WCNYHRR*, 21 NYCRR § 7.1-7.45. An employer is required to notify the Telecommunication Hiring Employment Information Center no later than 1:45 p.m. each day which of its regular and regular-extra gangs and list employees it intends to order during the following 24-hour period and those workers may report directly to the pier. *WCNYHRR*, 21 NYCRR § 7.14. Thus, except for extraordinary circumstances (not present in this case), the term of employment for all union labor on the New York/New Jersey waterfront is 24 hours or one day. Respondent Riggio does not dispute that when he (or any other clerk) was hired as a clerk, he could not be transferred to a checker job during that employment. Further, as stated by *amici*, such a transfer would be contractually prohibited (*Amici* Br. p. 5-6 n. 4).

Respondent Riggio disputes our assertion that claimant was a casual day laborer and that Maher orders labor each day from the local union hiring hall.[4]

Riggio's counsel goes on to suggest that Riggio was a permanent employee of Maher. While we acknowledge that the significance, or lack thereof, of claimant being on Maher's permanent "hire" list may not be entirely clear in the record below, we are also crystal clear that the two trial judges who heard this case understood the hiring system from years of trying cases in New York and were fully aware when determining that claimant lacked "status" that claimant was not a permanent employee of Maher.[5] Contrary to

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[4] This information was provided as "General Background" for those unfamiliar with the hiring system in the Port of New York/New Jersey and is supported by the Collective Bargain Agreement cited by *amici* (*Amici* Brief at 5-6, n. 4) and the *WCNYHRR*.

[5] As indicated in the Collective Bargaining Agreement and the Waterfront Commission Rules, the entire Port of New York/New Jersey is a casual day labor force for union workers. Being on a "list" merely entitles one to "priority of employment". *WCNYHRR*, 21 NYCRR § 7.2(a).

Respondents' assertions, the Third Circuit did not find that Riggio was a permanent employee of Maher but rather limited its inquiry to "Riggio's work history while employed by Maher" (App. 13a).

ARGUMENT

The Maritime Status Tests Applied by The Third and Ninth Circuits Are Fundamentally Different

Respondents argue that there is no conflict between the Third Circuit decision in this case (App. 1a-13a) and the decision of the Ninth Circuit in *McGray Construction Co. v. Director, OWCP*, 181 F.3d 1008 (9th Cir. 1999) on the ground that claimant's inclusion on Maher's permanent hire list makes him a permanent employee of Maher[6]. Without conceding this to be factually correct, it appears to petitioner that, for Respondents' argument to have any merit, they must concede that the "employment contract" or "term of employment" is the appropriate period for the inquiry into employment status. This is not consistent with the holding of the Third Circuit but is consistent with the Ninth Circuit holding in *McGray Construction*.

The Third Circuit held in this case that Mr. Riggio's prior employments with petitioner as a checker confer maritime status even when he is employed in the indisputably non-maritime job of clerk[7]. The Ninth Circuit has held that overall

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[6] As stated in *The Facts, supra*, Riggio was not a permanent employee of Maher. However, resolution of this factual issue does not affect petitioners arguments that the Supreme Court should resolve the legal question presented, i.e., whether employment status should be determined based upon the "term of employment" or "overall employment history with a particular employer".

[7] It is conceded by Respondents and the Court below that Mr. Riggio was hired as a statutorily excluded clerk on the day of his injury. 33 USC 902(3)(A); *See, also, Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 (3rd Cir. 1977).

employment history should not be considered but rather one should look at the job duties of the employment in which the employee is engaged at the time of injury. *McGray Construction*, 181 F.3d at 1014. (Was claimant engaged in maritime employment *on this job*?).

Much like the Third Circuit, the Respondents attempt to argue that there is no conflict among the Circuits. Specifically, respondents argue that *McGray Construction* only stands for the proposition that a worker cannot use overall employment history with multiple employers to confer status. In fact, Hurston (the claimant in that case) had worked for McGray Construction as a marine diver in the past and 90% of his overall employment history was marine diving. *McGray Construction Co. v. Director*, 112 F.3d 1025, 1033 (1997).[8] Thus, the only basis for disputing the conflict among the circuits is factually erroneous.

Respondents attempt to portray this petition as a disagreement with the Third Circuit's determination of a purely factual issue. The petition is much more important than the Director's misrepresentation suggests. It confronts an attempt by the Director to expand the coverage afforded by the LHWCA despite the 1984 Amendments which were intended to restrict coverage (Petition Point IV at 16-18). Respondent Director has consistently taken the position that "once a maritime worker, always a maritime worker". *See, e.g. McGray Construction*, 181 F.3rd at 1015-16; *Sea-Land Serv., Inc. v. Rock*, 953 F.2d 56, 67 n. 17 (3rd Cir. 1992).

His attempt to couch this petition as a dispute over the facts is specious at best. The Director concedes that the period the

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[8] As stated in the petition, the Ninth Circuit originally had accepted the Director's argument (the same argument the Respondents are making here), but withdrew that opinion in light of this Court's holding in *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997). (Petition at 8-9.)

Third Circuit used to determine employment status was ill-defined. The Director goes on to define it as maybe two or three years when claimant was on Maher's permanent hire list. (Director Br. 2-3, 8). As previously noted, Respondents argue that the permanent hire list equates to permanent employee status[9]. However, both Respondents agree that Riggio had worked for other employers during this 2-3 year period. (Director Br. 3-4; Riggio Br. 3; App. 17a). Having worked for other employers during the two or three year period, Riggio cannot be considered a permanent employee of Maher. Nowhere in the Third Circuit opinion does the Court find that Riggio was a permanent employee of Maher. Rather, the Third Circuit distinguished *McGray Construction* by restricting its inquiry to "only Riggio's work history while employed by Maher". (App. 13a). In other words, the Third Circuit applied a modified "overall employment history" test by inquiring as to Mr. Riggio's overall employment history *with Maher*. Under this test, a worker with a history of 99% maritime employment who takes a one day clerk job with another employer is not covered, but Riggio with a 50% past maritime employment history is. This creates confusion for employee and employer alike.

Respondents attempt to obscure the holding below by raising the permanent employee issue not addressed by the Court. However, the holding below is clear. A worker (Mr. Riggio in this case) satisfies the employment status requirement for coverage under the LHWCA if he has worked for a particular employer 50 percent of the time in covered work and 50 percent of the time in non-covered work and was injured while engaged by the same employer in non-covered work on the day of his injury (App. 13a). While the holding is

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[9] The Director appears to be proposing a new question for certiorari, i.e., whether being on an employer's permanent hire list modifies the Collective Bargaining Agreement and the *WCNYRR* to create "permanent employee" status.

clear, the approach taken is not. The panel did not identify the relevant time period for the 50/50 inquiry nor did the panel indicate whether some smaller percentage of covered employments would be sufficient to satisfy the status requirement. As indicated in the petition and by *amici*, the approach taken by the Third Circuit, if not addressed by this Court, could potentially lead to nationwide uncertainty as to who is covered and who is not covered by the LHWCA. The ambiguity hastened by the Third Circuit's approach has not been addressed by Respondents.

Conversely, the Ninth Circuit has developed a clear and easily applied test for determining employment status. In *McGray Construction*, the Court held that a worker could not use overall employment history to confer status where the worker was engaged at the time of injury in non-maritime employment. *McGray Construction*, 181 F.3rd at 1014. The Ninth Circuit looked at the job duties for the *employment* in which the employee was "engaged" at the time of injury. *Id.* On the day of his accident, Mr. Riggio was "engaged" (hired) as a clerk in indisputable non-maritime work. He could not be reassigned to maritime work during his term of employment (App. 2a; *see also*, brief of *amici* pp. 5-6 at footnote 4). In the Ninth Circuit, this would be the end of the inquiry and Mr. Riggio would be excluded from coverage.

The tests applied by the Third Circuit and Ninth Circuits are fundamentally different and are in direct conflict. Petitioner urges this Court to grant certiorari to resolve this conflict in order to provide uniformity in the application of this federal statute. Employers and employees, on a uniform national basis, should know whether the job assignment is covered employment under the LHWCA or not covered "before a particular work day begins". *Harbor Tug*, 520 U.S. at 558. The decision below rejects the holding of this Court in *Harbor Tug* and the Ninth Circuit's decision in *McGray Construction* which followed *Harbor Tug*.

The Court Below Had Subject Matter Jurisdiction

Respondents have raised the issue of the subject matter jurisdiction of the Third Circuit to hear the case. This issue was raised by motion of the Director to dismiss the appeal to the Third Circuit. The Director argued that the appeal was from a non-final order of the BRB since the BRB used the word "remanded". The Third Circuit denied the "motion because although the Board remanded the case to the ALJ for further consideration, there was nothing more for the ALJ to decide in light of the parties' stipulation resolving all issues except for the legal question of coverage" (App. 5a-6a, n.3). The BRB, after deciding the sole issue remaining in the case (status under the LHWCA), stated "the case is remanded to the Administrative Law Judge for consideration of any remaining issues" (App. 32a). The Director, and now Mr. Riggio, seized upon the "remanded" ruling to claim that the BRB's order was not a final order under Section 21(C), 33 U.S.C. 921(C) and that the Third Circuit erred in maintaining jurisdiction.

Respondent Director's statement that the stipulation was entered into *after* petitioner filed the petition for review in the court below (Director Br. 13) is a clear misrepresentation of the procedural facts. In fact, as the Third Circuit found, following the BRB first decision (App. 37a), the parties entered in a stipulation resolving all issues subject to the final resolution of the coverage issue (App. 4a). The stipulation was submitted as an exhibit to ALJ Romano at the hearing on remand. However, because ALJ Romano ruled that claimant was not covered under the LHWCA, he did not "so order" the stipulation.

Petitioner believes that the Third Circuit's ruling that it had subject matter jurisdiction was correct. It is unclear whether Respondents are urging this Court to decide this issue. It appears to petitioner that this Court has not ruled on the Third Circuit interpretation of the scope of the finality requirement

contained in section 21(c), 33 U.S.C. § 921(c). Perhaps the Court should grant certiorari on this issue as well.

CONCLUSION

It is respectfully submitted that this petition should be granted to resolve a conflict among the Circuits over the appropriate test for employment status under the Longshore & Harbor Workers Compensation Act and to remedy an erroneous Third Circuit decision that conflicts with prior decisions of this Court and legislative intent.

Respectfully Submitted,

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Supreme Court, U.S.
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No. 03-312

IN THE

Supreme Court of the United States

MAHER TERMINALS, INC.
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR and VINCENT RIGGIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, AMERICAN SHIPBUILDING ASSOCIATION and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Employment "Status" For Respondent Riggio Under The Longshore And Harbor Workers' Compensation Act Should Be Determined Based On: (1) "The Job He Was Hired For," As Held By The Ninth Circuit, Or (2) An Examination Of An Undefined Period Of His Past Work History, Unrelated To "The Job He Was Hired For," As Held By The Third Circuit?

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INTEREST OF *AMICI*[1]

The National Association of Waterfront Employers (NAWE) is a not for profit tax exempt 501(c)(6) trade

[1] Pursuant to S. Ct. Rule 37.2, letters of consent on behalf of Petitioner, Respondent, and the Federal Respondent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* state that they authored the brief in its entirety and that no party, other than the three *amici*, has made a financial contribution to the brief. Petitioner Maher Terminals, Inc. is a member of NAWE and has not made a financial contribution to this brief, other than through its annual dues assessment to NAWE.

association whose member companies are marine terminal operators/stevedoring contractors which load and unload 90% of the general cargo and containers on and off vessels in every U.S. seaport. With the exception of those members located in Puerto Rico, NAWE members are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA or Act).

The American Shipbuilding Association (ASA) is a national trade association representing the six major U.S. shipbuilders which build large commercial ocean going vessels and all of the capital ships of the U.S. Navy. ASA's six members employ over 53,000 shipyard employees in their shipyards, which is 90% of all shipyard workers engaged in new vessel construction in the U.S.

Signal Mutual Indemnity Association, Ltd. (Signal Mutual) is a group self-insurance facility authorized by the Secretary of Labor, pursuant to the LHWCA, to secure compensation benefits payable under the Act for its 200+ member employers.

All of the employers represented by NAWE, ASA, and Signal Mutual employ labor, on one or more sites generally covered by the Act, in employment categories subject to the LHWCA. Most all of them also employ other categories of workers on these same sites, such as the office clerk—Respondent Riggio—in this case, which are specifically exempted by the LHWCA from coverage under the Act. Thus, individually and collectively, *amici* have a keen interest in persuading the Court to grant the Petition for Certiorari so that a clear and uniform national rule setting forth the proper jurisdiction of the Act, as intended by the Congress, can be established.

SUMMARY OF ARGUMENT

An individual covered by a state workers' compensation statute is not eligible for coverage under the federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA or Act) if the individual is "employed exclusively to perform office clerical . . . work." LHWCA at § 902(3)(A). The federal question presented for certiorari is whether or not past employment history, unrelated to the job for which an individual was hired, should be considered when making this determination.

The Ninth Circuit held that the inquiry must be limited to the job for which the individual was hired without consideration of prior employment history. The Third Circuit held that even when it is clear that the job for which the individual was hired falls squarely within the statutory exclusion, an inquiry into some undefined period of past employment is required. This conflict between the circuits can only be resolved by the Supreme Court.

In addition, in the LHWCA context, this important question of federal law has not been previously addressed by the Court. If left to stand, the Third Circuit's holding would leave both employers and employees guessing as to who is and is not covered by the LHWCA, an untenable black hole for employers subject to an insurance program required and governed by federal maritime law. Upholding this approach would require years of litigation to determine what prior work history to consider and how. Only this Court can resolve the proper jurisdictional contours of the Act, as established by Congress, and thus avoid wasting the limited financial resources of covered employers and the significant economic consequences to those maritime industries covered by the Act. The uniformity and certainty of maritime law generally required by this Court also argue for granting the Petition for Certiorari.

ARGUMENT

Employers generally subject to coverage under the LHWCA typically employ some workers who are covered by the Act, and some workers who are covered by a state workers' compensation insurance regime. As with many LHWCA cases, this is not a question of whether Respondent Riggio is entitled to compensation, for that question was long ago resolved. Instead, the issue in this case is which workers' compensation statute applies—the federal LHWCA or a state workers' compensation statute.

The consequences of this legal question are far from academic, either for Respondent Riggio or for covered maritime employers, since the LHWCA is perhaps the most expensive workers' compensation program in the country.[2] Congress has recognized the significant costs associated with the LHWCA in the past and has taken substantial steps to conserve covered employers' financial resources by restricting claims to those truly subject to the maritime jurisdiction of the U.S., and excluding claims from other classes of workers best left outside this jurisdiction.[3]

An individual is only eligible for compensation under the LHWCA if the individual meets both the "situs" and "status" requirements of the Act. Situs is not at issue in this case.

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[2] The shore-based longshore workforce is close to, if not the highest paid blue collar workforce in the country with average compensation exceeding $100,000 per year, and with some specialized crane operators making over $300,000 per year. (There are even several attorneys who have chosen to forego the practice of law to be part of this workforce.) Over and above this compensation level, covered employers purchasing LHWCA insurance face additional costs in many maritime states that exceed fifty percent (50%) of their payroll costs.

[3] In addition to the 33 U.S.C. § 902 (3)(A) exemptions enacted in 1984, including the specific office clerical exemption at issue here, the Act contains other exemptions from coverage, such as employees of federal, state, or local governments. 33 U.S.C. § 903(b).

Instead, this case turns on whether Mr. Riggio meets the status requirements of the LHWCA, i.e., whether he is a covered "employee" for purposes of the Act:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . .

33 U.S.C. § 902(3). Congress in 1984 expressly excluded a number of categories of individuals who are frequently employed on a covered maritime situs (thus meeting the situs test for coverage under the Act) by expressly excluding them from the definition of employments subject to the Act (thus not meeting the Act's status test). Of relevance to this case is the first exception:

> but such term does not include—(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work . . .

33 U.S.C. § 902(3)(A). Thus, an individual performing office clerical, secretarial, security, or data processing work on a covered maritime worksite, is still expressly excluded from coverage under the LHWCA.

It is not in dispute that Respondent Riggio was performing office clerical work at the time of his injury. In other words, the work he was performing at the time of his injury was not eligible for coverage under the LHWCA. That fact would end the case right there but for one word in the statute—"exclusively." Was Mr. Riggio employed *exclusively* to perform office clerical work?[4]

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[4] On the date of his injury, Respondent Riggio was hired to work as a clerk in an office on the terminal, and not as a 'checker' clerk dealing directly with cargo containers at the terminal's truck lanes. Under the terms of the applicable collective bargaining agreement between the New

THE SUPREME COURT SHOULD GRANT CERTIORARI BECAUSE THE THIRD CIRCUIT AND NINTH CIRCUIT HAVE ISSUED CONFLICTING DECISIONS ON THIS IMPORTANT QUESTION OF FEDERAL LAW.

The Third and Ninth Circuits have issued conflicting decisions on how to apply the term "exclusively" under the LHWCA. The Ninth Circuit adopted this Court's approach in *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997) to answer the question of the meaning of "exclusivity." In *McGray Construction Company v. Director, OWCP*, 181 F.3d 1008 (9th Cir. 1999), the Ninth Circuit held that the test for "exclusively" must be applied to the job for which an individual is hired, regardless of his past employment history.

The Ninth Circuit stated the issue as follows:

> The main issue in this case is whether a person who has mostly done maritime work in the past, but takes a nonmaritime job, gets compensated for workplace injury under the workers' compensation system or the Longshore and Harbor Workers' Compensation Act.

McGray at 1009. The Ninth Circuit was clear that past employment has no bearing on LHWCA status. Instead, status must be determined based on the job for which the employee is hired:

> By analogy, working out of a union hall from which employers regularly hire maritime workers, and a history of maritime employment, do not make one a maritime

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York Shipping Association and the International Longshoremen's Association, Mr. Riggio could not be transferred from employment as an office clerk to employment as a checker clerk. "A clerk hired during the regular work period to perform office work shall not be transferred to other duties on the dock during that period." Part XI, para. 3 (A)(1)(b) *Clerking Agreement/Checkers Agreement between the NYSA and the ILA for the Port of Greater New York and Vicinity.* It appears to *amici* that this fact was not disputed below.

> employee, when an employer hires the individual for a non-maritime job. The statutory term "person engaged in maritime employment" means "engaged" on this job. That a person has been engaged in maritime employment in other jobs, and that he is hired out of a union hall that includes maritime workers, does not bring him within the Act, if his current employment is non-maritime.

McGray at 1014. The Ninth Circuit also noted that any other approach would lead to nonsensical results:

> The Director's position would also promote such striking unfairness to workers that the construction is unlikely to be what Congress intended. . . Congress did not in the Act create an aristocracy of labor, so that long-time maritime workers would be compensated more amply than others, even when hired for non-maritime employment, keeping their superior status while between maritime jobs.

McGray at 1016.

The Third Circuit in this case, rejected the sound reasoning of *McGray* and chose not to follow this Court's reasoning in *Harbor Tug. Director, OWCP v. Maher Terminals, Inc. (Riggio)*, 330 F.3d 162 (3rd Cir. 2003). The Third Circuit first recognized Respondent Riggio would not be eligible for coverage under the LHWCA based on the job for which he was hired:

> The law is clear that delivery clerks, performing the function that Riggio was on the day of his injury, are not covered under the Act. *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 (3d Cir. 1977); *see also Sette v. Maher Terminals, Inc.*, 27 BRBS 223 (1993) (denying coverage for a delivery clerk).

Riggio at 168. While this clear holding should have been the end of the case, the Third Circuit then proceeded to conduct an inquiry into Mr. Riggio's unrelated past employment experiences. In other words, the Third Circuit conducted the inquiry that the Ninth Circuit expressly held that Congress

never intended, and the inquiry that this Court declined to undertake in *Harbor Tug*.

This split in the circuits can only be resolved by this Court and we urge this Court to accept certiorari to resolve it.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN—BUT SHOULD BE—SETTLED BY THIS COURT.

The federal question presented for certiorari has not been addressed by this Court before and has important national economic implications for covered maritime employers.[5] As noted above, the legal principle was touched on by the Court in *Harbor Tug*. *Harbor Tug* involved the jurisdictional boundaries between the Jones Act, 46 U.S.C. App. § 688(a), and the LHWCA. The Jones Act and LHWCA are sister statutes that both find their authority in the admiralty and maritime jurisdiction of the federal government, (U.S. Const. Art. III, cl. 2), both have their origin in the maritime tradition of "maintenance and cure," and both have coverage that is mutually exclusive of the other. The Court noted in *Harbor Tug* that:

> In *Chandris*, the words "particular employer" give emphasis to the point that the inquiry into the nature of

[5] Most of the employer members of *amici* NAWE and the ASA are authorized by respondent Office of Workers' Compensation Programs (OWCP), pursuant to the applicable provisions of the LHWCA, to establish self insurance programs, and all members of *amicus* Signal Mutual Indemnity Association, Ltd. fall under the umbrella of this self insured mutual facility. These self-insurance programs need the nationwide uniformity and certainty, generally associated with this Court's maritime jurisprudence, of knowing exactly which of their employees are subject to LHWCA coverage, and which are excluded, in order to take reasonable care to conform their terminal employment practices to the jurisdictional contours of the LHWCA. These covered employers have been relying on the exclusions enacted by Congress when the Act was last amended in 1984 to manage healthy insurance programs.

> the employee's duties for seaman status purposes may concentrate on a narrower, not broader, period than the employee's entire course of employment with his current employer.

Harbor Tug at 556. The Court went on to hold that:

> Considering prior employments with independent employers in making the seaman status inquiry would undermine "the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act (and, perhaps more importantly for purposes of the employers' workers' compensation obligations, who will be covered by the LHWCA) before a particular work day begins."

Harbor Tug at 558, quoting *Chandris, Inc. v. Latsis*, 515 U.S. at 363.

The Ninth Circuit holding provides the certainty that this Court held is required by both the Jones Act and the LHWCA. Looking to the job for which an employee is hired, nothing more and nothing less, provides certainty for both the employee and the employer. When an employee is hired for an expressly exempt job, the employee is not covered. When an employee is hired for a covered job, the employee is covered.

The Third Circuit approach fails to provide this certainty. To the contrary, without years of further litigation, it will be impossible to tell which employees are covered by the LHWCA and which are not. What prior work history should be considered? How many years or months back should the inquiry go? What happens if there is a gap in work for a day, a week or a month or six months before an employee returns to a non-covered position? How are multiple short gaps treated? What if an employee works in a covered position, and then works for another employer for a day or a week, before taking a non-covered position? These are just the start of the questions that must be answered under the Third

Circuit's approach before employers and employees can start to have any idea of who is—and who is not—covered by the LHWCA.

Equally as important, the Third Circuit's approach leads to the absurd results discussed by the Ninth Circuit. Two employees working side-by-side performing the exact same work, both get injured, but one is covered by the LHWCA and one is not because of past, unrelated work. Or two employees are hired to perform office work. They both did longshore work for the past six months, but one of them did the longshore work for another employer. Under the Third Circuit's holding, one would be covered by the LHWCA and the other would not.

If the Third Circuit's holding is allowed to stand, short of removing office clerical employment entirely from a covered situs, the only approach an employer could take to avoid this legal minefield would be to refuse to hire any worker who had ever worked for the employer before in a covered employment category for these highly coveted office clerical jobs. Clearly, Congress did not intend such absurd results. This Court should accept certiorari to resolve this important question of federal law and bring certainty to the application of the LHWCA.

CONCLUSION

Because there is a split in the circuits and this is an important question of federal maritime law that needs to be resolved by this Court, *amici* urge the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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